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ACCORD AND SATISFACTION.

It is remarkable to observe the regular progress of the doctrines of commercial law, and to notice how, one by one, the barriers of the old system have been overthrown. Here and there, however, a few ruins remain, and we were forcibly impressed with the difficulty of engrafting the rules of commercial intercourse upon the stock of the common law, by an examination of the doctrine of *Accord* and *Satisfaction*. Its general principles are doubtless familiar to all, but there are one or two open questions of considerable importance. It is stated in 2 Greenl. Evid. § 31, that "whether an accord with a *tender of satisfaction* is sufficient without acceptance, is a point upon which the authorities are not agreed. It is, however, perfectly clear, that a mere agreement to accept a less sum in composition of a debt is not binding, and cannot be set up in bar of the original contract." Again, in the same section, it is said, "But whether, where the agreement is for the performance of some collateral act upon sufficient consideration, a tender of performance is equivalent to a satisfaction, seems still to be an open question, though the weight of authority is in the affirmative."

The question stated in the last extract seems so clear upon the principles of common sense, that it may well be wondered how any combination of the artificial rules of law can suggest a different result. The matter has vexed the courts of common law for

centuries, yet we cannot recognize any principle, which has been clearly set forth, or steadfastly adhered to.

The whole difficulty appears to be referable to a curious doctrine which gained favor with the courts, and is stated in *Allen* v. *Harris*, (1 Ld. Raym. 122.) It was there held that a promise for a promise constituted a mere *nudum pactum*. In accordance with this idea, an accord without satisfaction was held bad. But the cases in which this was originally decided, though they announce the result, do not contain the reasons upon which the rule is said to be founded. One of the earliest cases is reported in 43 Edw. III. 33. That was an action of trespass, and the plea was an accord, but there was no allegation that the plaintiff had performed his part, for which reason it failed. In 16 Edw. IV. 8. b. Catesby contended that a plea of accord was good, and Littleton held with him. This case seems to be wholly overruled in *Robinson* v. *Leavitt*, (7 N. H. 73.) and in *Wentz* v. *DeHaven*, 1 S. & R. 312. The case reported in 17 Edw. IV. 8, was an action of *trespass*, and a plea of tender and refusal was held bad. Of course, no tender can be made in the case of unliquidated damages. The next case is in 6 H. VII. 10. This was an action of *trespass*, and no tender was alleged. Consequently the plea of accord failed. These three cases of trespass are constantly cited to support the doctrine that an accord without satisfaction is no bar. But they all turn upon the well known rule that in an action *ex delicto* a tender cannot be pleaded. Yet in *Peytoe's case*, (9 Co. 77 b.) the court saw fit to recapitulate them, and by a misconstruction of them to introduce a cardinal error into the law. *Peytoe's case* was an action of ejectment, and a question seems to have been raised in the course of the discussion, by the sergeants, which had nothing to do with the case. The question was this, "whether, if a man be bound to do any collateral act, the obligor cannot, by accord between them, give money or some other valuable thing in satisfaction, as well as where he is bound to pay money, in which case he may give a horse or any other valuable thing in satisfaction thereof?" The court, "to satisfy the said question moved amongst the sergeants," saw fit to go over the whole law of accord and satisfaction, and establish a number of principles which really do not result from the authorities they cite. They there enunciate the rule which does not seem to have been ever fairly stated before, that if the thing be to be performed at a day to come, tender and refusal are not sufficient without actual satisfaction and acceptance.

The influence of this blunder may be easily traced, though it was a great while before the question came fairly before the court. In *Tassall* v. *Shane*, (Cro. Eliz. 198,) the case failed among

other things for want of a tender. In *Case* v. *Barber*, (Sir T. Raym. 450,) the statute of frauds came in the way; *Allen* v. *Harris*, (1 Ld. Raym. 122,) was merely a case of the liquidation of damages. In *Lynn* v. *Bruce*, (2 H. Black. 317,) the court relied wholly upon Lord Coke. In *Preston* v. *Christmas*, (2 Wils. 86,) it was held that there was no good satisfaction, because an equity of redemption is nothing at law, which is not now true.

In 1810, the whole matter came before Lord Ellenborough at Nisi Prius, in the case of *Bradley* v. *Gregory*, (2 Camp. 385,) and either because he forgot some of the earlier decisions, or because his great mind was superior to such quibbling, he took a position before unheard of. A tender had been made agreeably to the terms of a previous accord, and Lord Ellenborough held that as the defendant had done all in his power to complete the compromise, a party should not be permitted to say that there had been no satisfaction, if the satisfaction had been offered. It would be unjust.

Yet, twenty-seven years after, Ch. Just. Tindal, in the C. B. reiterates the doctrines of Lord Coke, and thinks the current of authority too strong for contradiction. In the State of New York, the doctrine of Lord Ellenborough has been sustained in the single case of *Coit* v. *Houston*, (3 Johns. Cas. 243,) where the court expresses its opinion, although it was not essential to the case. There have subsequently been two leading decisions in the State of New York, where the contrary doctrine was held, but it is very strange that in one of them, *Russell* v. *Ly'tle*, (6 Wend. 391,) the court manifest an entire ignorance of the case of *Coit* v. *Houston*. *Hawley* v. *Foote*, (19 Wend. 516,) hardly covers the same ground.

It is rather mortifying to consider that a single error should have so diverted the whole course of the law, and it may caution others against unnecessary disquisitions for the *gratification of the sergeants.*

The second case stated in Prof. Greenleaf's work seems perfectly clear upon principle. The original compromise evidently amounts to an independent executory contract of imperfect obligation. It may certainly be decomposed into the four essential elements to which all contracts are reducible, — competent parties, a subject of the contract, a consideration for it, and an actual consent. The first and most natural objection is the supposed inadequacy of the consideration. *Bayley* v. *Homan*, (5 Bing. 920,) *Bryant* v. *Gale*, (5 Ver. 421,) and if the agreement should be stripped of its attending circumstances, it is hardly to be supposed that any one would relinquish any part of a just claim without a motive. But to neglect these surrounding circumstances, would

be to omit the most important part of the transaction. And so says the law. Commencing with the case of *Cumber* v. *Wane*, (1 Strange, 425,) the courts have repeatedly declared, that a security of an equal sum cannot be pleaded in an action for the larger one. All this results naturally enough from the doctrine of consideration, but it also results that the creditor may violate his promises with impunity, though freely and honestly given, and with as much solemnity as attends the ordinary transactions of life. *Brooks et al.* v. *White*, (2 Metc. 283.) The natural influence of such a rule would be to promote bad faith in the business world, and the courts have readily seized upon any circumstances which would obviate the theoretical difficulties of extinguishing a debt by the payment of a less sum. Thus, where there is any collateral act to be performed, which may raise a technical legal consideration as against the payee, the courts have refused to apply the rule of *Cumber* v. *Wane*. For instance, if the smaller sum is to be paid at an earlier time, or at a more convenient place, or if a third person is to become responsible, or if it is to be paid in articles of a different nature, — in all these cases, subject to a few qualifications, which will be mentioned in their place, the law will protect and enforce the compromise. There is one more class of cases of a more recent date, where the ingenuity of the bench has been taxed to the utmost to overcome the technical difficulties, which are set forth in *Cumber* v. *Wane*. These are the bankruptcy cases, where the debtor enters into a composition with his creditors to pay a certain per-centage of their respective demands, upon which he is to receive a complete release, the courts deciding that the consent of the other creditors constitutes a sufficient consideration to save these contracts from any technical objections. Such exceptions prove the narrowness of the original rule ; and all must admit them to be in accordance with strict justice, and well calculated to preserve the harmony of society. And it is not a little amusing that the old judges should have attacked these compromises, quoting the maxim, "*Interest reipublicæ ut sit finis litium.*" Their advocates have since adopted the same maxim, and with far more justice.

Upon these grounds, we venture to lay out of the case all objections founded upon any supposed inadequacy of consideration. The next serious objection we have already alluded to by calling such compromises contracts of imperfect obligation. This objection, upon principle, is far from clear, but is, nevertheless, so well fortified by authority, that it must be admitted that an accord executory is no bar. It must be executed. The rule is laid down

in *Peytoe's case*, being one of the gifts of the old judges contained in their lecture to the sergeants. It has since been generally followed, and Mr. Wallace, in his elaborate note to the case of *Cumber* v. *Wane*, (1 Smith's Lead. Cas. 253,) deduces it as an indispensable requisite to a good accord and satisfaction. It would be more consistent with common justice to pay more respect to promises, and to recognize the obligation of a contract operating as an acord and satisfaction, with a promise to accord at a future day, as well as of a contract for the sale of goods, with a promise to deliver at a future day. By the civil law, the obligation developed by a novation, which seems closely to resemble an accord and satisfaction, differs in regard to the necessity of execution. A novation is the substitution of a new debt for an old, but it does not follow that a new debt must be discharged, before the creditor loses his remedy on the old. On the contrary, the whole debt is as completely extinguished as it would be by an actual payment, so that (to state a strong case) if one of several debtors *in solido* should contract a new engagement with the creditor as a novation of the former debt, the former debt would be extinguished, and his co-debtors released. Poth. Obl. *n.* 563. And in a delegation, which is but another name for a novation, whereby a third person assumes the obligation of the original debtor, the discharge of the latter does not depend upon the payment of the debt by the party delegated, but is completed by the delegation, unless it is expressly stipulated that the debtor shall, *at his own risk*, delegate another. But these provisions are peculiar to the civil law, and we, who number the common law among our Anglo-Saxon inheritances, must take it as it is. Whether these provisions might not be borrowed with advantage, remains to be seen. That step has not yet been taken. The courts of common law seem quite as unable to understand the substantive nature of a promise, as any of their predecessors were to conceive of the circulation of negotiable paper. The judges told the sergeants as much, and consequently it must be assumed that an accord not executed constitutes only a contract of imperfect obligation.

But how is this imperfection to be healed? or, in other words, what constitutes execution? It is a principle pervading the whole law of contracts, that if one of the elements of a contract is the performance of subsequent acts, the original consent of the parties sustains it, and the performance will perfect it without any new *consensus animorum*. The performance of a condition precedent will perfect a contract, even without the approbation of the party in whose favor it is to be performed. A familiar illustration of this

may be found in a contract for the sale of goods; for, in that case, though the original bargain may transfer the property, yet the purchaser acquires thereby only an inchoate title, and has no right of possession, if the goods be not paid for, and no credit be agreed upon. But when the price is tendered, be the vendor ready to receive it or not, the title of the vendee is complete, and he may sue for the goods. More than this, if the contract be to deliver goods, upon the vendee's request, it will be enough to establish such a request, and a readiness to receive and a refusal to deliver them, without proving a tender of the price. In cases of insurance, the *consensus animorum* precedes the signing of the policy, but even then the rights of both parties are imperfect, — one depending upon the return of the vessel, the other upon her loss, yet upon the occurrence of either of these events, the rights of the parties become complete. What has been said of the contracts of sale and insurance, is true of every other contract; nor does it follow, by any means, that the assent of the parties must be renewed, because the performance has been postponed. In the civil law, the same principle is set forth in the case of the *pactum constitutæ pecuniæ*, which is a new promise to discharge a previous obligation, and the debtor by offering to perform this promise, can be liberated from the previous obligation, *per exceptionem pacti*, as it is called. The effect of such an obligation is thus illustrated by Pothier, (Obl. Part ii. c. 6, s. 9, § 4.)

"Suppose a person who owes me thirty pistoles, has promised to give me six gallons of wine of his own vintage in payment, this pact does not destroy the former obligation. I may, by virtue of that, demand from my debtor the thirty pistoles, and my demand may *ipso jure* be supported; but as I have agreed by the pact that he may pay me, instead of this sum, six gallons of his wine, he may, *per exceptionem pacti* on offering such wine, require to be liberated from my demand of thirty pistoles; his former obligation, which was a pure and simple obligation, to pay me precisely the sum of thirty pistoles, receives by the pact a modification, and becomes an obligation of thirty pistoles, with the power of paying the six gallons of wine in its stead."

Now, governing our case by these analogies, does it not result, that every accord is a contract of which what is technically called satisfaction is a condition precedent, — that the requisite *consensus animorum* takes place at the time of the compromise, — and that after that compromise has been effected, it is no longer discretionary with the creditor whether he shall be bound by his promise, but he must be satisfied with a fair performance.

Why, when it is so generally admitted, in every other case of contract, that a tender and refusal constitute a sufficiently good performance of a condition precedent, it should be denied in cases

of accord, is difficult to perceive. The whole trouble originated in the utter inability of the old common-law judges to understand the fluctuating value of a *chose in action*. For a long time they held, that they were not assignable. Now, there are some, who hold that their value is the same under all circumstances.

We are not enthusiastic admirers of the civil law, nor do we wish to do injustice to the memory of the early judges. We thought, however, that the present case might afford an amusing instance of the obstinacy with which one of the old common-law fortifications has withstood repeated attacks by the civilians and the merchants. We thought it also not a little amusing, that in constitutional England, and almost under the shadow of the Parliament-house, they should have succeeded, by misrepresenting the Year Books to the sergeants, in engrafting a rule upon the common law, which exerts almost as much influence upon the transactions of daily life, as any statute of the realm.

In regard to the position taken by Prof. Greenleaf, although it is so consistent with common sense, and it is to be hoped it will be adhered to in cases which may arise hereafter, it ought not, perhaps, to be said that "the weight of authority" is on that side, unless the clear and manly decision of Lord Ellenborough is thought to outweigh all the doctrines of Lord Coke and his followers.

There seem to be three classes of accords. The first includes cases of torts, in which clearly there can be no tender. The second is represented by the case of *Cumber* v. *Wane*, and includes those cases where there is an agreement to pay a less sum for a greater. In these cases, there is the technical defect of the want of consideration. The third embraces those cases, where there is some new consideration moving at the time of the accord. In these the intent governs. *Brooks et al.* v. *White*, (2 Metc. 283.) There seems to be a distinction taken by some decisions, between those cases, where the *promise* is to be received in satisfaction, and those where the performance is to be. In the latter case, there can be no satisfaction without performance. *Reeves* v. *Hearne*, (1 M. & W. 326.) And if the record is to be perfected by the performance of some subsequent act, a tender of performance ought to be sufficient. There surely can be no reason for rejecting the principle of tender in this case, any more than in the original agreement. It should be quite enough, that the party has a remedy to compel the performance. Com. Dig. Accord, B. 4. *Good* v. *Cheesman*, (2 B. & Ad. 328.) But it does not appear to have been decided that a tender of performance is equivalent to a satisfaction, except in

Bradley v. *Gregory*, and *Coit* v. *Houston*, ut sup. The first is a *nisi prius* case, and in the latter the question was irrelevant. Both cases have since been contradicted. But as a matter of principle, they stand on so firm a ground that it remains to be seen whether any court can be so unjust to the law as to disregard them. The whole question must interest the curious, because the ruling in Coke's Reports is almost the only relic of the subtle law of his time, which has survived the inroads of the commercial system.

Recent American Decisions.

Circuit Court of the United States, Massachusetts District, October, 1847, at Boston.

Ex parte Snow.

A debtor in prison, to whom a commissioner has refused to administer the poor debtor's oath, may take it before another commissioner afterwards, if, in the meantime, he has gone into insolvency, and surrendered all his property to assignees. The debtor's right in the latter case relates to a different period, and to a different condition of property.

A second hearing might be proper in such cases, whenever a mistake or other circumstances appeared, which would justify a rehearing or new trial in other proceedings at law.

Semble, that if the district judge allow a second examination, and the examination takes place, and the oath is administered, such proceedings must be regarded as conclusive in favor of a petition by the debtor for a *habeas corpus* to the jailor who had refused to discharge him; especially if no defect appear upon the face of the record, and the facts do not seem to be entirely erroneous.

Where the debtor has surrendered all his property, doubtful points should be construed in favor of his personal liberty.

Where no injury or suffering is likely to happen during a hearing on a rule to show cause, the writ of *habeas corpus* will not issue, till after such a hearing.

This was a petition filed by Nathaniel Snow, on the 18th October, for a writ of *habeas corpus*, setting out substantially the following facts:

Two suits had been instituted against him by John B. Myers & Co. in this court, on which property had been attached as belonging to Snow. But the title to it was contested; and, after judgment, only one execution was levied upon it, the question as to the

title remaining unsettled. An execution on the other judgment was sued out, June 14th, 1847, and Snow was arrested on the 22d of the same month, and committed to the jail at Cambridge in Middlesex county, in this district, where he is still detained by Nathaniel Watson, the keeper of said jail.

On the day after he was committed, he procured the liberty of the yard on the prison limits, but he was afterwards surrendered and again placed in close confinement.

He soon petitioned the district judge to admit him to take the poor debtor's oath, and be discharged from prison, and the judge appointed Charles Sumner, Esq. a commissioner for that purpose, who, after an examination, under objections by Myers & Co. that Snow still possessed property of considerable value, declined to administer the oath, and returned the precept, with his refusal indorsed thereon.

On the 17th, Snow applied for the appointment of another commissioner to administer the oath, he having in the meantime taken the benefit of the insolvent act of Massachusetts, and all his property passed to the messenger, and, in due time, to the assignee selected by the creditors. This last point, however, was not set out in the petition, but was shown at the hearing of the cause.

The district judge being informed of this change in Snow's situation, allowed another commission to issue, empowering Ephraim Buttrick, Esq. to make the examination and administer the oath; and on the 13th of October, he administered it, after hearing the parties, and certified the fact in writing to the jailor, who still refuses to discharge him.

The court, on this petition, ordered a copy to be served on the jailor, and notice to be given to him and the creditors to appear the next day and show cause why a writ of *habeas corpus* should not issue, with a view to discharge the prisoner. The next day, the jailor and creditors appeared, and the parties were fully heard. The writ was ordered to issue, and the day after the prisoner was brought into court by the jailor, with a return that he held him by virtue of the original execution, and that though the certificate last referred to of the poor debtor's oath having been administered to Snow had been lodged with him, he entertained such doubts of its validity, on account of a prior examination and refusal, as not to feel justified in discharging the prisoner, till some court of competent authority should direct it.

H. M. Chamberlin, for petitioner.
G. G. Hubbard, for respondent and creditors.

The opinion of the court was pronounced by

Woodbury, J. In this case the petition would be in better form if amended, and containing the fact, conceded at the hearing, that between the first and second examination a change had happened in the situation of the petitioner as to property — all of his having been assigned under the insolvent laws, and that fact stated to the district judge as a reason for issuing a second commission. The petitioner is at liberty, therefore, to make that amendment, and, having made it, the case will be considered as it now stands.

First, there had been one commission, and an inquiry under it, in August, 1847, and a decision made, that Snow then appeared to possess so much property as not to be entitled to have the poor debtor's oath administered to him, under either of the acts of congress on this subject — of 1800, or 1824, or 1837.

There is no objection to the validity of that proceeding. And, whether in strict law it is to be considered as *res judicata* between the parties on this point, or not, it would be trifling with the process issued in these cases, and with the decisions of respectable commissioners, to allow another hearing of the same point before another commissioner of like authority and on the same state of facts. There should at least be as much shown to justify it, as is required to have a rehearing in equity, or a new trial at common law. There should be a new state of facts, or newly-discovered evidence, or a clear mistake shown on the old facts. But when either of these is done, if a rehearing or new trial be proper on such grounds, it would be proper, *a fortiori*, to allow another examination in a case like this. Here some such grounds did appear on the second application to the judge. The whole property, which prevented a discharge at first, had been surrendered to the creditors, and all the obstacles to the debtor's being considered poor were removed. The judge, on being informed of this, properly allowed another commission; and for anything now shown on the merits, Snow was properly allowed then to take the poor debtor's oath.

If, as is urged, proceedings of this kind should be viewed like actions between parties, and conclusive on the merits once settled, it is manifest that, by analogy, a new hearing was proper, on a state of facts occurring which was materially new. So, beyond this, it is manifest that a former judgment between the parties, as, for instance, that one was not a poor debtor on a certain day, viz. the 5th of August, should be no bar to showing that he had become a poor debtor on the 14th of October. The point settled is not the same; it relates to a different period, and of course neither in form or substance should the first decision in such a case be conclusive

as against the second one. *Burnham* v. *Webster*, and *Greely* v. *Smith*, (Maine Dist. Oct. 1847); and the precedents and reasons there collected.

It might have been better to have set out the change in his property in writing, to the district judge, on the second application. But in proceedings like these, not usually very formal, where both parties were present at the subsequent hearing, the decision appears to have been correct on the facts. I am disposed in this collateral proceeding, and in favor of personal liberty, not to be over critical, and to uphold them. 1 Tidd Pr. 567. It is another consideration in favor of such a conclusion, that this course cannot cause any essential injury or damage to the creditors. They have a prior claim in the attachment in the other action to all the debtor's property, which they choose to seize. They have enjoyed the privilege of waiving their doubtful attachment in this case, and resorting to imprisonment of the body in order to compel a surrender of any secreted property; and again, after this discharge, they can probably prove this debt and be allowed a *pro rata* dividend out of all the property in the hands of the assignees.

As another evidence, that the second examination here was proper on a new state of facts, such a one is understood to be given by the Massachusetts statute in express terms. Rev. Stat. ch. 98, § 12, p. 596–7. Nor was the length of the notice of fifteen days, as is argued, objectionable; the act of congress requiring only fifteen days, however the local laws may provide for more time. *Lockhurst* v. *West et al.* (7 Metc. 230.) This objection, too, could not equitably avail after an appearance, and being overruled, as it was before the commissioner, and a full hearing had on the merits.

But, beside these answers to most of the exceptions, there exists another entitled to much weight. This is, that the district judge, in whom the power is vested in these cases by the acts of congress, has allowed the second examination; that the commissioner under him, after objections made, has also decided to go into it, and has actually administered the oath to the debtor; and that no request has been made by the creditors to the district judge, or any other proceeding instituted to annul or set aside the doings of the commissioner, or his certificate to the jailor.

There is much then in the idea, that in this collateral, and in some respects independent, inquiry, we ought to consider those proceedings binding till reversed or quashed. More especially should we do this, unless on their face they appear to be so defective as to be utterly void, — see cases in *Suffolk Bank* v. *Merrill*, (Maine Dist. Oct. 1847) — or are impeached now by proof of fatal irregu-

larities. But so far from that, they appear well enough in form, though not so full in some particulars as might be desirable. Nor has any evidence been offered to show them to have been irregular and illegal, or to have been either fraudulent or evasive of the just rights of creditors. On the contrary, there seems presented a proper condition of things for permitting the poor debtor's oath and a discharge. And any suspected concealment of property, or any other attempt by the debtor not to let his creditors enjoy the full benefit of his estate under the insolvent law is open to exposure, and can effectually be defeated by attending to and enforcing the provisions of that law before the appropriate state tribunals.

On the whole case then, — both on its face, on the record as well as on the facts elicited in this hearing, — it seems to me that we should be doing violence to the wishes of congress, as expressed in their several acts, and be accessory to a further infringement of the liberty of a citizen after he has surrendered all his property, and on a hearing been adjudged entitled to a discharge, if we were to allow him to be detained longer in prison under the process of this court. So far, then, as he is detained by that process in favor of Myers & Co. in the proceedings we have been examining, he must be set at liberty.

Note. Though a *habeas corpus* is often issued on the petition, without any hearing first or a rule to show cause, and may be most proper when danger of removal or much suffering and long delay are probable, yet in other cases, as here, it is better to issue a rule to show cause first. See *Miller's case*, (9 Peters, 706.)

Supreme Court of Vermont, Windsor County, March Term, 1847.

John Adams *v.* Alfred Gay.

A contract entered into, in a state where there is no law prohibiting secular labor upon Sunday, is not so far *contra bonos mores*, as not to form the proper subject-matter of an action in our courts.

The statute laws of another state, when relied upon as a defence to a contract, upon the ground of its illegality, must be proved, upon the trial, like any other facts, in the case, and cannot be supplied in the court of errors, by producing there the statute-book of that state.

All contracts, of an ordinary secular character, and which are not properly works of necessity, or charity, if finally consummated upon Sunday, are void. So that no action can be maintained, either upon the contract or for the recovery o what may have been done under the contract, by way of disaffirming the contract.

Nor could an action, for fraud or false warranty, in the sale of an article upon Sunday, be maintained, unless the contract were reaffirmed upon some other day.

But in such cases, and in all cases of contracts made upon Sunday, where either party has done anything in execution of the contract, it is competent for them, upon another day, to demand of the other party a release of the thing delivered, or where that is impracticable, compensation; and if the other party refuse, the original contract becomes thereby affirmed, and thus binding to the same extent as if made upon the latter day.

This is considered an exception to the general rule, in regard to illegal contracts, but is indispensable to secure parties from fraud and overreaching, practised upon Sunday by those who know their contracts are void, and that they are not liable *civiliter* even for frauds practised upon that day.

THE opinion of the court was delivered by

REDFIELD J. The facts necessary to be recapitulated here, are, that the plaintiff and defendant exchanged horses, *in the State of New Hampshire*, upon Sunday. In that exchange the defendant was guilty of fraud and misrepresentation, as the jury have found, in the case. This became known to the plaintiff upon the same day, and he requested the defendant to re-exchange, which he declined doing. Some days subsequently, and not upon Sunday, the plaintiff made the same request of defendant, tendering back to him at the time, the horse which he had received of him; but defendant refused either to take back his own horse, or to surrender the plaintiff's. Whereupon this action was brought for the deceit and false warranty, in which the plaintiff recovered a verdict under instructions from the court, that under the foregoing state of facts the defendant was liable for whatever damage the plaintiff sustained by his fraud and misrepresentation, or by any breach of warranty on his part. The defendant tendered a bill of exceptions, in regard to this part of the charge of the court, which was allowed, and the case brought here for revision. It did not appear that there was any evidence given upon the trial of any statute in the state of New Hampshire prohibiting secular labor upon Sunday.

I. The question first made, is, whether the law of New Hampshire, which at the date of this contract prohibited all secular labor upon Sunday, except such as is of necessity or charity, can be regarded in determining the present action; and to us it seems very clear, that it cannot. 1. It is obvious, that whenever the law of any other state is relied upon, as varying the rights of the parties in any

cause, the existence and motives of that law must be shown in the course of the trial of the cause, the same as any other fact is proved. It may be true, and doubtless is, that courts do not ordinarily require proof of the existence, in foreign states, (where contracts may be made which are sued in our own courts,) of the very first principles of natural, moral, or commercial law. We should presume, perhaps, until the contrary were shown, that all civilized states regarded those fundamental laws of the social compact. And indeed, if it were shown, that a contract between our own citizens was made in a state where there was no law by which the obligation of contracts could be enforced, existed, we should, I apprehend, uphold an action upon it, upon the ground that it was probably entered into, with reference to some law by which it might be enforced, else it would seem a very idle ceremony.

But beyond this, it is not easy to say that the courts of this country, or of England, have ever taken judicial notice of the laws of other countries. It has been often said, by English judges, and often decided by the English courts, that they will not take judicial notice, that even the law of Scotland, or Ireland, is the same upon any given subject, as the law of England. And it is the constant practice in all the courts, in Westminster Hall, and in all the American States, to prove the unwritten laws of other states, by witnesses, upon the stand, skilled in these laws. And I do not know that it was ever held, in any country, that the courts could take judicial notice of the written laws of another state, and especially the criminal laws and internal police regulations of such state; such a law must always be proved by the production of the law itself, or a properly authenticated copy.

2. It might be supposed, that the production of the statute of New-Hampshire, in this court, would be sufficient. But for many years this has been regarded as insufficient. This court sits merely as a court of error. We may indeed suspend the hearing, for the purpose of allowing an amendment, in any part of the record of the court below, when any diminution is suggested. But no fact can be supplied, in this court, even when proved by matter of record. *Blake* v. *Tucker*, (12 Vermont R. 39.) Those cases, where the statutes of other states have been read in this court, to show the power of magistrates to take depositions there, have been, where this court takes judicial notice of such powers, and consequently the statutes are read, like any other book of authority, to instruct the mind of the court. *Barron* v. *Pettes*, (18 Verm. R. 385.)

II. The law of New Hampshire, then, being out of the case,

on account of it not having been proved at the trial, the contract between the parties is valid, unless it is void upon general principles of public policy, as being of evil example to our own citizens, to see such a contract enforced in a court of justice. That the English and American courts have long refused to uphold certain contracts, on account of their general pravity, admits of no doubt whatever. Of this class are contracts to secure an immoral end, or such as are based upon an immoral consideration. Such are, contracts to procure the seduction of an innocent female, or contracts for future cohabitation, or to encourage or support one in prostitution, or to procure any one to commit a crime or fraud, or any immorality. But no case can be found, I apprehend, which goes the length of declaring all contracts, made upon Sunday, of this class. And as we are now called upon to determine how far a contract made upon Sunday is, on that account, immoral, and so void, it becomes necessary to examine carefully the ground upon which we go. 1st. It is certain, that such a contract is not a violation, or in any way in contravention of the statute of this state, if entered into in another state. 2d. It should be determined whether such contracts are considered immoral, at common law. Here the authorities are full. All the English cases carefully distinguish between contracts, which are of the "ordinary calling" of the parties, and such as are not in the "ordinary calling." The former, if made upon Sunday, are void; the latter not. This distinction is based upon the words of the English statute of 29 Car. II. ch. 7, § 1, which prohibits only work of one's "ordinary calling." And contracts, not within this prohibition, have always been held valid there. *Drury* v. *Defontaine*, (1 Taunt. 131); *King* v. *Inh. of Witmarsh*, (7 B. & C. 794); *Fennell* v. *Ridler*,) 5 B. & C. 406); *Rex* v. *Brotherton*, (1 Strange, 702.) And it is even now held in the English courts, that one, taking a contract upon Sunday, of one in his ordinary calling, may still maintain an action upon it, unless he at the time knew that it was of the "ordinary calling of the party." *Bloxome* v. *Williams*, (3 B. & C. 232); 2 Stark. Evid. 245, in note, citing *Begbie* v. *Levy*, (1 Cr. & Jervis, Eng. Ex. R. 180.) It is manifest, then, that by the English courts such contracts, when not within the probibition of the statute, are not esteemed *contra bonos mores*, or in any other way invalid.

III. And I certainly feel some little reluctance in further examining this case, upon this gronnd; knowing, as I do, that there exists great diversity of opinion upon this subject; and where the court are only to declare the law, it would seem sufficient that no

law exists, whereby such a contract has yet been held immoral. But opinions have somewhat altered, in regard to the strictness of the observance of the Lord's day, and possibly some might feel, that such a determination as we here make, tends in some degree to relax that strictness. This we certainly have no desire to do. For whatever might be the feelings of any member of the court, in regard to the propriety of observing other days also, as religious fasts or festivals, there could be but one opinion in regard to the strict observance of the Lord's day, among consistent Christians.

But while sitting here to determine cases, we are to be mindful that our own feelings, or private opinions upon religious matters, or those of others, have little to do with the results to which we should come. It is also to be remembered, that, in this State, full immunity for all religions, and no religion, is equally given by the fundamental law of the State. No man can be abridged of his perfect liberty in that respect. And while this does not forbid the legislature from passing general laws against blasphemy, the desecration of the Lord's day, and the disturbance of public worship, it does, impliedly at least, forbid the adoption of any law which is not necessary for the quiet enjoyment of religious feeling and religious worship. So that all laws, which it is competent for the legislature to adopt, must have reference solely to preventing the disturbance of our citizens in their religious feelings or devotions. Beyond this, the constitution of the state absolutely prohibits any law. How, then, can it be said, that a contract made out of the state, upon Sunday, is any violation of the religious feelings or any infringement of the religious devotions of our citizens, any more than if made upon any other day?

There is only one other ground, upon which, it seems to me, that it could be seriously contended, that such a contract is immoral; that is, that its enforcement here tends to shock the moral sense of the community. I have no doubt such is the fact in regard to a portion of the most serious-minded, earnest, and strenuously religious of our citizens. And no one can doubt that the feeling of so considerable and influential a portion of the cittzens of the state is entitled to the highest consideration. But in making inquiry into the state of the moral feeling of the whole community, we must not forget that, upon religious matters, it is almost infinitesimally divided. And before we could determine that any given cause shocked the moral feeling of the community, we must be able to find but one pervading feeling upon that subject. So much so, that a contrary feeling, in an individual, would denominate him either insane, or diseased in his moral perceptions. Now

nothing is more absurd, to my mind, than to argue the existence of any such universal moral sentiment, in regard to the observance of Sunday. It is in no just sense a moral sentiment at all, which impels us to the observance of Sunday, for religious purposes, more than any other day. It is but education and habit in the main, certainly. Moral feeling might dictate the devotion of a portion of our time to religious rites and solemnities, but could never indicate any particular time above all others.

But this will be best determined by the actual state of opinions among us, upon this subject. Some of our citizens are atheists, perhaps; a considerable number deists, or rationalists; and among Christians, there is an almost infinite diversity of opinion in regard to this subject. The Irish catholic, who may have become a denizen of the republic, regards St. Patrick's day perhaps as the most sacred in the calendar. The French catholic is willing to labor every day in the year almost, except on St. Peter's day. If he is well informed, and conscientious, he will hardly forget Good Friday, or Christmas, or Ash-Wednesday. The same is true, in regard to these latter days, with the consistent members of the church of England, or of the Lutheran church, or of the Greek church, if any such there be among us. Now all these regard Sunday; but not as more sacred than some other days. It is but in commemoration of the weekly recurrence of the Lord's day, the Resurrection. But Easter-day, which is the *annual* festival of the Lord's day, is truly the great day of the feast, — the Sunday of Sundays, the crowning festival of the year! And this, with Good-Friday, Ash-Wednesday, Christmas, and some few other prominent fasts and festivals, are most religiously observed in all the ancient churches; and in all the Lutheran churches, — which embrace Holland, Sweden and Denmark, Russia and Germany, so far as they are protestant; — and in the English church, and all its branches. And so are all the Sundays in the year, but with far less solemnity than the greater fasts and festivals above-named. In addition to this, it must be remembered that we have among us some Jews, perhaps, and some Seventh-day Baptists, who do not egard Sunday at all; and many of the Friends, who regard all days alike. This may all be very unwise or very unreasonable, in the estimation of some; but it is none the less true; and we must take things as they are. How, then, can it be said, that to enforce a contract made upon Sunday, out of the state, is shocking to the moral sense of the community? One might desire to have it so; and might possibly hope, or even believe, it will soon become so; but nothing almost would be more absurd than to claim that it is

so at the present time. As the case now stands, then, the plaintiff is clearly entitled to have judgment affirmed. But as the case has been fully argued upon the effect of the New Hampshire statute, and its existence was no doubt a conceded fact in the court below, and might now be stated in the bill of exceptions, by the judge who tried the case, we should be sorry to determine the case against the defendant upon that ground. But as we would not delay the case to procure that amendment, unless when procured it would avail the defendant, we will proceed to examine that point.

IV. The New Hampshire statute is so much the same as our own, that we may consider the case, upon this point, the same as if the contract were made here. It has already been decided in this state, that a contract, *finally executed* upon Sunday, is void. *Lyon* v. *Strong*, (6 Verm. R. 219.) But, where not fully closed upon that day, the contract is not void, because some of its terms might have been fixed upon that day, or indeed because most of the business out of which the consideration for the contract arose, was transacted upon that day. *Lovejoy* v. *Whipple*, (18 Verm. R. 379.) The contract is held to be void, upon the familiar principle that all contracts made in contravention of an express statute — whether the sanctions of the statute are enforced by a penalty, or not — are void. The contract being void, it will follow of course, that, so long as the matter remains in that state, no action can be maintained, either upon the contract, or for anything done under it or growing out of it. So that, in the present case, the plaintiff could not, in the first instance and upon general principles, have maintained any action for the recovery of his own horse, or to recover damages for the fraud or false warranty of defendant. This certainly is the general rule, in regard to contracts which are void for illegality.

But to this general rule there are many exceptions; and these exceptions are framed mainly by judicial construction, and are founded upon some superior policy to that general policy which dictated the rule itself. And it seems to the court, that in the class of contracts now under consideration, there *is* a most urgent necessity so to administer this rule in regard to them, that it shall not be in the power of the reckless and irreligious to circumvent and defraud the unwary, under the guise of the sacredness of the time when their own injustice was perpetrated. We have little doubt such practices have already been attempted in some cases, and that it might become a not unfrequent resort of those who desired to effectually cut off all remedy for their own fraud and dishonesty.

If the general rule of holding contracts, made upon Sunday, void, is, also, to shield the contracting parties from the consequences of their frauds, and to allow the dishonest and abandoned to retain whatever they may be able to get possession of under such contracts, and at the same time release them from all liability upon their own contracts, then the rule itself will be productive of infinite mischief, and should be discarded at once. But with such qualifications, as the English courts have already hinted at, we think the rule a safe one. We think contracts made upon Sunday should be held an exception, in some sense, from the general class of contracts, which are void for illegality. Such contracts are not tainted with any general illegality; they are illegal only as to the time in which they are entered into. When purged of this ingredient, they are like other contracts. Contracts of this kind are not void because they have grown out of a transaction upon Sunday. This is not sufficient to avoid them; they must be finally closed upon that day. And although closed upon that day, yet if affirmed upon a subsequent day, they then become valid. *Williams* v. *Paul*, (6 Bing. 653.) The same principle is distinctly recognized also in *Bloxome* v. *Williams*. And if it is competent to affirm a contract of this kind upon some other day, it follows that there must be a very essential difference between such contracts and most other illegal contracts, which can never be so affirmed as to bind the parties. But we would choose not to leave it to the election of either party to disaffirm such a contract at will; for this also might lead to abuses. But in those cases where the contract remains executory upon both sides, and was made upon Sunday, it is simply void until subsequently affirmed by mutual consent. Where either party has done anything, under such a contract, for which of course he would have no remedy under the contract, until it were subsquently affirmed, he may demand restitution of the thing, where that is practicable, — and where it is not, compensation; and thus he will put the other party to his election, whether to affirm or disaffirm the contract. If he decline to make restitution, or, when that is impracticable, compensation, this is, in fact, affirming the contract, and should be so held. In the present law, insisting upon retaining the fruits of the fraud, the defendant did in fact reaffirm the fraud itself, and must now be bound by its consequences the same as if it was committed upon any other day.

This exception to the general rule of illegal contracts is as reasonable and necessary, and goes upon the ground mainly of many others, which have been long recognized in courts of justice; that is, of relieving an oppressed party, and putting it in his power to

visit the oppression upon the oppressor. It is upon this ground, that money, paid for usury, for the insurance of lottery tickets, to procure the requisite number of creditors to sign the certificate of a bankrupt, and in some other cases, may be recovered back, notwithstanding the party paying the money is implicated, in some sense, in the illegal transaction, but not in the same sense, with the one who thus receives the money. The one commits a wrong voluntarily; the other, by a kind of duress of circumstances, is compelled to submit to become the instrument of wrong, and is so denominated the oppressed party.

So, too, in regard to the present subject; the parties, in consenting to enter into the contract upon Sunday, were equally guilty. The law, therefore, will give neither party any advantage from the contract. But when one party has performed the contract on his part, and the other seeks, through his own violation of the statute and desecration of the Lord's day, to obtain a benefit without compensation, he becomes the oppressor, and the other the oppressed party; and it is upon this ground, in analogy to the principles above alluded to, that the court affords this relief, or redress. With this qualification the rule seems to us a salutary one, and without it to be almost insufferable.

We are fully sensible, that some portion of the reasoning, upon which we have made this case an exception to the general rule, if carried out to the fullest extent, would subvert the general rule, that neither party is entitled to redress in a court of justice, for any injury sustained in consequence of entering into an illegal contract. But we do not consider this class of contracts as tainted with any such general corruption, as attaches to most cases of illegal contracts. If that were so, it would be impossible to defend many of the English decisions upon this subject, which we have here but followed out, to their legitimate results. And in making this class of contracts an exception to the general rule, we are not sensible of departing more from the spirit of the rule, than has already been done, in allowing other exceptions, or than is necessary in allowing exceptions to most general rules.

As it is obvious, from the foregoing determinations, that the defendant is liable, in the present action, upon the facts found, the judgment below is affirmed.

Supreme Court of New York, September Term, 1847, *at the city of New York.*

IN THE MATTER OF NICHOLAS LUCIEN METZGER.

The president of the United States cannot execute the power of extradition under a treaty, without both legislative and judicial sanction.

The state courts have no original authority in such questions; whether the federal courts ought not to entertain jurisdiction, *quære?*

A judge of the district court of the United States, sitting in chambers, has no authority te require the surrender of a criminal under the treaty.

Where the judge of the district court has exercised the power of extradition, and the president has issued his mandate to the marshal, directing the surrender of the prisoner, the judge of a state court may, upon a writ of *habeas corpus*, inquire into the legality of the president's mandate, and the course of the district judge, even after the supreme court of the United States have disclaimed any authority, on their part, to review the action of a district judge at chambers.

Where the two originals of a treaty are in different languages, and they can without violence be made to agree, that construction which establishes this conformity ought to prevail.

By the treaty with France of 1843, no prisoner can be surrendered by one government, until he has been indicted or arraigned, (*mis en accusation.*)

THE prisoner was a notary public in one of the departments of France, which he left and came to this country. After he had left his residence, it was charged against him that he was a defaulter to his clients to a large amount, for moneys of theirs which he had embezzled, which embezzlement he had attempted to conceal by means of forgeries.

Complaint to that effect was made against him, before a French committing magistrate, who issued a warrant for his arrest. He was not, however, apprehended on the warrant, but the papers, duly authenticated, were transmitted to this country, and the French minister to this country demanded his surrender under the treaty with France of 1843. That functionary was referred by the secretary of state, to the courts or magistrates of the country, and accordingly made application to one of the police magistrates of New York for a warrant, on which Metzger was arrested. An examination was had before that officer, and who adjudicated that the prisoner was within the treaty, and issued his warrant committing him to prison until the president of the United States should demand him.

Before that demand was made, the prisoner was taken before the circuit judge of the first circuit on *habeas corpus*. That officer decided that the police magistrate had no jurisdiction in the mat-

ter, and the prisoner was entitled to be discharged from that commitment.

The French diplomatic agent then made application to the United States district judge, before whom similar proceedings were had, which resulted in a similar adjudication and a like warrant of commitment.

Application was then made to the supreme court of the United States for a writ of *habeas corpus* to review the action of the district judge. The application was denied on the ground that that court had no power to review the action of a district judge at chambers.

Thereupon the president of the United States issued his mandate to the marshal of New York, commanding him to surrender the prisoner to the diplomatic agents of the French government. Before, however, the surrender was actually made, a writ of *habeas corpus* issued, directed to the marshal, returnable before Edmonds, circuit judge. The matter was twice argued before him, and under the judiciary act of 1847 was transferred from him as circuit judge to him as judge of the supreme court under the new constitution.

N. B. Blunt and *O. Hoffman*, for the prisoner, demanded his discharge for these reasons:

1. That the crime alleged was committed between the signing of the treaty and its ratification, and was therefore not within its operation.

2. That the prisoner had been only charged with the offence, and not indicted; that he was *inculpé* and not *accusé*, and therefore not within the treaty.

3. That the president of the United States had no authority to act in the matter until congress had provided by law for the execution of the treaty.

4. That the federal judiciary had no power to arrest, examine or commit but under a statute, and as no statute had been passed there were no means provided by government for executing the treaty.

5. That the act charged is not a crime under our laws, and therefore not within the treaty.

6. That the president's mandate is not conclusive, but its foundation may be inquired into and be impeached.

B. F. Butler, United States district attorney, *contra*.

I. It appears from the marshal's supplemental return, and it is

conceded by the replication, that the prisoner is held in custody by virtue of the president's mandate, for his surrender to the authorities of France, as a fugitive from the justice of that country within the meaning of the convention of the 9th of November, 1843.

II. The validity of this mandate is therefore the only question now to be decided, though in order to its decision, it is proper to look into the provisions of the treaty, the orders of Judge Betts contained in the return, and the evidence presented to and taken before him, and transmitted by him to the state department, for the purpose of ascertaining whether they authorize the action of the president.

III. The treaty, although not obligatory on either of the contracting parties until the exchange of ratifications, then became a part of our supreme law, and by its true construction it authorizes and requires the surrender of fugitives from the justice of either party, found within the territories of the other, who, at any time after the 9th of November, 1843, and duly proved to have committed any of the crimes enumerated in the treaty. This construction does not render the provision liable to objection as an *ex post facto* law, within the meaning of the prohibition of such laws in the constitution of the United States, because,

1st. The prohibition referred to, if it can be extended to cases arising under treaties, can only apply to cases within, and persons amenable to, the jurisdiction of the United States.

2d. The treaty neither creates the crime nor increases its punishment. If it alters the situation of the criminal, it does so only in respect to the remedy, and, under our constitution such laws are valid.

IV. The treaty being part of the supreme law, addressed to the judiciary as well as to the executive, Judge Betts had competent authority, upon the complaint and affidavit laid before him, to issue his warrant for the arrest of Metzger, and to inquire into and decide upon the subject-matter of such complaint; this authority was duly exercised by him in the order committing Metzger to the marshal, to abide the order of the president; and his decision conclusively sustains that order. It is *res adjudicata*.

V. The validity of the president's mandate does not necessarily depend on the question, whether or not Judge Betts had jurisdiction; and whatever may be the true answer to that question, yet as the third article of the treaty (differing in this respect from all our prior treaties of this nature) expressly provides that the surrender shall be made by the president; and as the president in this case has made order to that effect, his mandate must be deemed

lawful and should be executed, provided it be found, on looking into the evidence, that Metzger is, within the meaning of the treaty, a fugitive from the justice of France, whose surrender is duly demanded by the government of that country.

VI. It appears by the return of the marshal, and the evidence, that Metzger is such fugitive, and that his surrender is so demanded.

1st. The word "*accusé*," in the French side of the treaty, is to be understood in its general sense, and as equivalent to the English word "charged," by which it is twice rendered in the English side.

2d. The proofs annexed to the affidavit of Mr. Borg, are properly authenticated to be read as evidence, and by them it appears that Metzger has been charged with and accused of having committed in France, since the date of the treaty, the crime of forgery, as defined and denounced in the French penal code.

3d. It is not necessary that the forgery, with which the prisoner stands charged, should also constitute the crime of forgery, as defined in the acts of congress, or by the law of New York.

4th. The government of France, through its proper diplomatic agents, has demanded his surrender from the executive of the United States.

VII. The mandate of the president being fully warranted by the provisions of the treaty, and the facts of the case, the prisoner should be remanded to the custody of the marshal.

Edmonds, J. This case involves the question whether the president of the United States has authority, by virtue of mere treaty stipulation and without an express enactment of the national legislature, to deliver up to a foreign power and virtually to banish from the country, an inhabitant of one of the sovereign states of our confederacy.

The importance of the question has weighed heavily upon me during the whole time that the case has been before me.

The right is claimed and has been exercised by that high functionary in this instance; its exercise is demanded by the French government in the name of the treaty between the two nations, and a branch of the federal judiciary has sanctioned it.

Amid this imposing array of power against him, the prisoner, a resident among us and entitled to the benefit of our laws, has thrown himself for protection upon state sovereignty, and demanded the interposition of its authority between him and the exercise of this extraordinary power. To that protection he has a right,

in common with every inhabitant of our state, and it becomes my duty, as one of the state judiciary, to see that he sustains no injury in the exercise of this power.

The apprehension that out of the discharge of this duty, there might spring a conflict between national and state authority, has not been without its influence on my mind, causing me to pause long and weigh well any decision which I might make. Presenting to my mind, as this case does, the picture of the whole power of the nation claiming and enforcing the surrender of the individual on the one hand, and personal liberty demanding protection against the exertion of extraordinary power on the other, I have not been free from anxiety as to the conclusion at which I might arrive, and the consequences which might flow from it.

The question is, in a great measure, under our institutions, anomalous, arising out of that peculiar provision of our national constitution, which declares that all treaties made under the authority of the United States shall be the supreme law of the land. But for this provision and the construction which is claimed for it, the question might justly be regarded as already settled by authority. The British government, in February, 1843, made a treaty with France, identical in this regard with the convention between France and the United States. The British administration and the British parliament did not deem that the convention executed itself, or that it could be executed without legislative enactment. Hence the statute 6 and 7 Vict. c. 75, was passed, which recited this clause of the convention, and declared that it was expedient that provision should be made for carrying it into effect; and then enacted that any justice of the peace, or other person, having power to commit for trial persons accused of crime, &c., might examine witnesses, and issue his warrant to apprehend the alleged fugitive and commit him to jail until delivered pursuant to the requisition.

Under this statute, the lord mayor of London, in September, 1844, issued his warrant for the arrest of an alleged fugitive from France, who, on being arrested, was brought before the queen's bench on *habeas corpus*. That court held the warrant void, and on being applied to, for the purpose of remanding the prisoner as a person accused, under the treaty, they denied that they had any power but under the statute, and if its provisions were not clearly complied with, they had no power at all in the matter. *In Re Bessett*, 1 New Sessions Cases, 337.

Here then is a decision that, on principles of common law, the treaty does not execute itself, and that even the highest judiciary

in the nation could not act under it, but in pursuance of a statute, and this exposition flows not merely from the British courts, but also from the British executive and the British legislature.

I know of nothing, except the provision of the constitution of the United States to which I have alluded, which can exempt our courts from the binding force of the same doctrine, when they and the English courts alike draw the principles of their action and the rule and guide of their judgments from the same fountain of the common law.

Hence arises the necessity, in this case, of considering the meaning and force of this constitutional provision, and of inquiring how far it does, *ex proprio vigore*, and without legislative sanction, confer upon the officers of the national government, the power of executing the various matters to which it relates.

In the first place it must be observed that the provision in question does not relate to treaties alone. It is the constitution itself and the laws of the United States, which shall be made in pursuance thereof, and all treaties made or which shall be made under the authority of the United States, which shall be the supreme law of the land. Const. Art. 6.

If this provision has this self-acting power in regard to treaties, it has it equally in regard to the constitution at large, and from this consideration, we may well appreciate the magnitude and interest of the question involved.

What is the meaning of the supremacy here provided for? That the power is itself omnipotent — self-acting and self-dependent alone — and that the functionary clothed with it, if perchance he be the executive, is in that regard beyond the control alike of the judicial and legislative departments of the government. Such must be the result, if that provision does give, as is claimed in the argument before me, to the constitution and to treaties this self-sufficing authority.

But such, as I understand it, is not the true reading of this provision. The twenty-second number of the Federalist defines its purpose in language more felicitous than any which I can use.

"The treaties of the United States, to have any force at all, must be considered as part of the law of the land. Their true import as far as respects individuals must, like all other laws, be ascertained by judicial determinations. To produce uniformity in these determinations, they ought to be submitted, in the last resort, to one supreme tribunal. . . . . If there is in each state a court of final jurisdiction, there may be as many different final determinations on the same point as there are courts. . . . . To avoid the confusion which would unavoidably result from the contradictory decisions of a number of independent judicatories, all nations have found it necessary to establish one tribunal paramount to

the rest, possessing a general superintendence, and authorized to settle and declare in the last resort a uniform rule of civil justice. . . . . The treaties of the United States, under the present constitution, are liable to the infractions of thirteen different legislatures, and as many different courts of final jurisdiction."

Hence arose the establishment of a supreme judicatory, not that it should be omnipotent and self-sufficing in its power, but that, within its sphere, it should be paramount to all other judicatories. Hence too the provision in question, that the constitution, the laws made in pursuance of it, and the treaties should be the supreme law; not that they should be omnipotent and self-sufficing in their authority, but that they should be paramount over all other authority, so that, if when duly executed, they should come in conflict with any other, they should be supreme and paramount.

This is no novel doctrine. But as I read the history of our country, it has prevailed from the beginning, though not now for the first time questioned.

In the celebrated case of Jonathan Robbins, Chief Justice Marshall, then a member of the house of representatives, asserted the same claim which is put forth for the government in this case. But he went further and followed the doctrine out to its legitimate results, by insisting that the case was one for executive and not judicial decision, and that the judicial power cannot extend to political compacts, such as the case of the delivery of a murderer under the twenty-seventh article of Jay's treaty with Great Britain. 5 Wheaton, App. 16.

In several instances, however, and at different periods, congress has, by its action, given a different construction to this provision of the constitution.

A few instances will suffice. The constitution, article 3, § 2, declares that the judicial power shall extend, among other things, to all cases affecting ambassadors, other public ministers and consuls, and that in those cases the supreme court shall have original jurisdiction. It might well be supposed, that if any power in that instrument, which is to be the supreme law of the land, could be thus self-acting, it must be the power thus explicitly conferred. Yet in the judiciary act of 1789, § 13, congress provides for the exercise of this jurisdiction, both for and against ambassadors and other public ministers. So, too, article 4, § 2, provides that fugitives from justice, shall, on demand of the executive of the state from which they have fled, be delivered up to be removed to the state having jurisdiction of the crime.

This provision, also, of the supreme law of the land, might be supposed to execute itself, yet congress, in 1793, passed a law upon the subject, in order to carry it into effect.

The origin of this law is a striking illustration of the interpretation which prevailed in those early days.

It grew out of a demand made by the governor of Pennsylvania upon the governor of Virginia for the surrender of a fugitive from justice. With that demand the executive of Virginia refused to comply, for one reason, among others, because congress had not passed any statute to execute this provision of the supreme law of the land. The opinion of the attorney-general of Virginia, assuming that position, and the reply of the executive of that state sanctioning it, were communicated to congress by President Washington, in October, 1791, and out of that state of things flowed the statute which has for more than half a century governed the whole action of our citizens in that regard. 20 American State Papers, 38.

If the claim now asserted is well founded now, it was so then; and if well founded, then indeed were this statute and also that which came into existence at the same time in regard to fugitives from service, works of idle supererogation on the part of congress.

So too the same article of the constitution provides that persons held to service or labor in one state, escaping into another, shall be delivered up on claim of the party to whom such service or labor may be due.

This provision too of the supreme law, so far from executing itself by virtue of its supremacy, is helped out and carried into effect by the same law of congress, and sprang from the same necessity for legislative action, which was then conceded.

So too the article of the constitution (article 2, § 3,) which declares it to be the duty of the president to take care that the laws be faithfully executed, is helped out and carried into effect by the act of 1795, which gives him authority to call out the militia to suppress insurrection in any of the states.

These are all provisions of the constitution, the supreme law of the land, which congress has at an early day deemed it necessary to legislate upon, for the purpose of carrying into effect.

And it may well be asked why this necessity, if this supreme law was, by virtue of its supremacy, self-sufficing and did execute itself without legislative interposition?

Such also has been the action of congress and the interpretation of the national government in relation to our treaties, which are also the supreme law.

In 1788, a convention was entered into between France and the United States, providing for the arrest and surrender of deserting seamen, in which it is provided that for that purpose the consuls

shall address themselves to the courts, judges, and officers competent, and demand said deserters, in writing, &c. And all aid and assistance to the said consuls shall be given for the search, arrest and seizure of said deserters, who shall be kept and detained in the prisons of the country, &c. In 1824 a similar treaty was made with the Republic of Columbia, and from that time down to 1845, various treaties with nations in Europe, Asia, and America have been made containing the same provision as to deserting seamen.

Specific as is this provision in these various treaties, pointing out as it does even the manner in which the power shall be exercised, congress and our government have been so far from regarding it as capable of executing itself, that in 1829, a law was passed, in language scarcely more particular than the various treaties, providing for carrying them into effect.[1]

A marked instance of a similar character is of more recent occurrence. We have a treaty with Spain providing against privateering, and declaring that if any person of either nation shall take a commission as privateer or letters of marque he shall be punished as a pirate.

Yet neither congress and our government regarded this treaty, though the supreme law of the land, and distinctly defining the offence as piracy, and thus bringing it clearly within the jurisdiction of the federal courts, as sufficient to execute itself, but on the 3d of March, 1847, passed a law in the following words:

"That any subject or citizen of any foreign state who shall be found and taken on the sea, making war upon the United States, or cruising against the vessels and property thereof, or of the citizens of the same, contrary to the provisions of any treaty existing between the United States and the state of which such person is a citizen or subject, when by such treaty such acts of such persons are declared to be piracy, may be arraigned, tried, convicted, and punished before any circuit court of the United States, for the district into which such person may be brought, or shall be found, in the same manner as other persons charged with piracy may be arraigned, tried, convicted and punished in said courts."

So far as the supreme court of the United States have acted on this question they seem to have adopted the same principles. In *Foster* v. *Neilson*, (2 Peters, 314,) they declare that a treaty is in its nature a contract between two nations, not a legislative act. It does not generally effect of itself the object to be accomplished,

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[1] This act is understood to owe its origin to the fact that so distinguished a jurist as Judge Story refused to execute one of these treaties until congress had legislated on the subject.

especially so far as its operation is infra-territorial, but is carried into execution by the sovereign power of the respective parties to the instrument. In the United States a different principle is established. Our constitution declares a treaty to be the law of the land. It is consequently to be regarded in courts of justice as aquivalent to an act of the legislature, whenever it operates of itself without the aid of any legislative provision. But when the terms of the stipulation import a contract; when either of the parties engaged to perform a particular act, the treaty addresses itself to the political, not to the judicial department, and the legislature must execute the contract before it can become a rule of court. And speaking of the particular treaty then under consideration, they add: "This seems to be the language of contract, and if it is, the ratification and confirmation which are promised, must be the act of the legislature. Until such act shall be passed, the court is not at liberty to disregard the existing laws on the subject."

In the *United States* v. *Arredondo*, (6 Peters, 734,) that court affirms the same doctrine, and again speak of the treaty, which is a contract between two nations, the stipulations of which must be executed by an act of congress, before it can become a rule for their decision.

These two cases involved the treaty with Spain of 1819, and they grew out of the words used in it, that certain grants "shall be ratified and confirmed." The court held that if those words imported that those titles "are hereby ratified and confirmed," then the treaty, by virtue of its being the supreme law, operated *per se* to ratify and confirm; but if they imported a contract, that they should at some future period be ratified and confirmed, then the treaty did not execute itself, but it must be executed by an act of congress before it could become a rule for the decision of the courts. In other words, where the treaty is a contract to be performed *in futuro*, the English rule, as laid down by Lord Denman in 1 New Sess. Ca. 337, is applicable; the courts have not any power but under the statute, and if its provisions are not clearly complied with, they have no power at all in the matter.

The supreme court of the United States, a third time, in reference to those words, reiterate the doctrine. In the *United States* v. *Percheman*, (7 Peters, 87,) Chief Justice Marshall says that, although the words "shall be ratified and confirmed" are properly words of contract, stipulating for some future legislative act, they are not necessarily so. They may import that they shall be ratified and confirmed by force of the instrument itself.

In the latter signification of the terms, in a country where the treaty is the supreme law of the land, it may perchance be well said that the treaty executes itself. But this provision in the convention with France, under which this prisoner is held, can in no such sense be held to execute itself. It never was intended to act *in presenti*. It was a contract between the two nations to be executed only *in futuro*, and in the language of principle, of the action of congress, and the decisions of the federal judiciary, it stipulated for future legislation, without which, as the queen's bench declares, the courts have no power at all in the matter.

In the debate in congress on the case of Jonathan Robbins, it was stated that President Washington had entertained doubts whether the extradition clause in Jay's treaty could be executed without legislative action. And in 10 Serg. & Rawle, 135, the supreme court of Pennsylvania express the same doubt, and declare that the opinion of the executive hitherto had been that it had no power to act.

In the case of *Prigg* v. *Commonwealth of Pennsylvania*, (16 Peters, 624,) the provision of the constitution as to the surrender of fugitives from service was under consideration, Story J., in delivering the opinion of the court, speaking of that clause, which enacts that the fugitive shall be delivered up on claim of the party to whom such service may be due, says: "We think it exceedingly difficult, if not impracticable, to read this language, and not to feel that it contemplated some further remedial redress than that which might be administered at the hands of the owner himself. . . . They require the aid of legislation to protect the right, to enforce the delivery, and to secure the subsequent possession of the slave."

And the court, in this case, in adjudicating upon language very similar to that contained in this treaty, declare that the constitution does execute itself so far as to establish the absolute right of the owner to recapture his slave; but that to enforce the right the aid of legislation is required. And by parity of reasoning, while we may regard this treaty as executing itself so far as to establish the right of the French government to the surrender, legislation is required to enforce the delivery and secure the subsequent possession of the fugitive.

The want of this legislative sanction on which so much stress is laid, is not mere matter of form. It is a substantial right, and involves too deeply the liberty of the citizen to be dispensed with.

Treaties by our government are made by the executive, without the sanction of the legislature. The extradition provided for by

this convention with France, is not confined to the subjects of France. An American citizen may be demanded by the French government, and our executive may, on such demand, banish a native of our soil — nay, if one, then hundreds. And it becomes us well to see that power so great should be properly guarded.

There is another consideration flowing from this view of the case. Neither the constitution, the laws nor the treaty, which together constitute the supreme law as to this case, provide for the interposition of the judiciary in the exercise of this power. On the other hand, the treaty provides, that on the part of the United States the surrender shall be made only by the authority of the executive thereof. And although the executive has, in this case, with great propriety, invoked the aid of the judiciary, yet he has done it in such manner that the decision of the subordinate tribunal appealed to, cannot be reviewed in the court of dernier resort, and therefore becomes final.

And if the right claimed in this case, for the executive to act in the matter without legislative sanction, be once firmly established, I cannot discover any provision in the supreme law which renders it necessary for him to seek the aid of the judiciary. It may be convenient for the executive to resort to the machinery of the judiciary, or the incumbent, for the time being, may entertain such a sense of duty as to induce such a resort, but the right once established as now claimed, it must necessarily become a matter of discretion with the executive whether he will require the assent of either the legislative or judicial departments to his surrendering to a foreign government any person, native to the soil or immigrant, whom it may please to demand as a fugitive from its justice.

In the absence of any statutory provision the executive can resort for the rule of its action only to the treaty. The treaty with France nowhere provides for a resort to the judiciary. Persons accused of crime shall be delivered up, provided that this shall be done only when the fact of the commission of the crime shall be so established as that the laws of the country would justify their apprehension and commitment for trial. How established, and before what tribunal? It is the executive alone who can surrender, and if the treaty alone is to be the guide of his action, then, when he becomes satisfied that the commission of the alleged crime is established, whether that be with or without the aid of the judiciary, he can surrender.

Such is the claim presented before me, and if established then is the liberty of the citizen, at least as respects extradition, subjected to executive discretion, to an extent that is calculated to

alarm even a country where freedom in the aggregate is so common that its invasion in detail is too often and too easily disregarded.

To meet an objection so formidable in its character, it is urged that the aid of the judiciary must of necessity be invoked in the execution of the treaty.

I have already had occasion to decide in this case that the state magistrates have no original authority in the matter. Not having seen any reason for changing my opinion, and that opinion having been acquiesced in by all parties concerned in this matter, that must be regarded as *pro tanto* the law of this case. The remaining question then is, whether any of the federal magistrates have the authority. The question may well be put still more broadly, and comprehend not merely the inquiry whether the federal judiciary may entertain jurisdiction, but also whether it ought not to be the duty of the government and the right of the prisoner to make the appeal to them. I will not stop, however, here, to consider that question, but pass at once to the simple topic of the authority of the federal magistrates, voluntarily, or otherwise, to act in the matter. And this topic need not be discussed any further than to the extent and as to the manner in which the authority has been exercised in this case.

It must then be observed in the outset, that the action on which the prisoner was committed, was not the action of any court, but of a district judge as such. The arrest, examination and commitment, were none of them the act of the district court, but of the judge as such at chambers, or as committing magistrate. It is important to keep this fact in mind, as it was one of the main grounds on which the United States supreme court refused to this prisoner his application for the writ of *habeas corpus*, and it brings us to the real question in this case, whether a district judge, not sitting in court, has the power to aid in carrying a treaty into effect.

Marshall, in his speech in *Robbins's Case*, repeatedly denied the authority of the judiciary in every form. That was the second proposition he maintained, (5 Wheat. App. 16,) which was, that the case was a case for executive, and not judicial decision. He proceeded to refute the position of Mr. Livingston, that the judicial power of the United States expressly included that under consideration. He maintained (p. 17,) that the judicial power cannot extend to political compacts, as the establishment of a boundary line, &c. or the case of the delivery of a murderer, under the twenty-seventh article of our present treaty with Great Britain, and he proceeded with this language: "The gentleman from New

York has asked, triumphantly asked, what power exists in our courts to deliver up an individual to a foreign government? Permit me," said Mr. Marshall, "but not triumphantly, to retort the question — By what authority can any court render such a judgment? What power does a court possess to seize any individual, and determine that he shall be adjudged by a foreign tribunal? Surely our courts possess no such power. Yet they must possess it, if this article of the treaty is to be executed by the courts." And he concluded with the remark: "The case was in its nature a national demand made upon the nation. The parties were the two nations. They cannot come into court to litigate their claims, nor can a court decide on them. Of consequence, the demand is not a case for judicial cognizance."

Again, (on page 28) he says, "It is then demonstrated, that according to the practice and according to the principles of the American government, the question whether the nation has or has not bound itself to deliver up an individual charged with having committed murder or forgery within the jurisdiction of Britain is a question, the power to decide which rests alone with the executive department."

The inference from that debate and its results, is as fair, perhaps, as any other, that the majority of congress who went with him on that occasion, and in the language of Judge Story, "put the question at rest forever," intended to sustain that as well as the other principles which he then advanced.

Mr. Marshall maintained that, a treaty providing for the surrender of fugitives being made, the executive was competent of itself, without judicial or legislative aid to execute it. How far he is competent without legislative aid, has already been shown from authority, upon principle and by the action of the government for fifty years. And the United States supreme court in the case of *Holmes* v. *Jennison*, (14 Peters,) and more recently on the application of Metzger for a *habeas corpus*, have recognized the necessity of judicial action.

But then the questions recur, whence do the judiciary derive their authority to act in the matter? Who is to set them in motion, and what is to regulate and control the form and manner of their going? And how are the rights of the accused to be protected?

These are important questions, under our state constitution which declares, that no man shall be deprived of any of the rights or privileges secured to him unless by the law of the land, or the judgment of his peers.

The learned judge, upon whose warrant the prisoner was committed, evidently has strong doubts on this subject, though he thinks them capable of a satisfactory solution. But the solution which he discovers is applicable only to courts of the United States, not to the judges acting out of court; and he seems to have overlooked the distinction which the supreme court have since rendered so important, as on that ground alone to deny to the prisoner the privilege of having his case reviewed in the federal courts. Under that decision, I am not at liberty to disregard so grave a distinction, and am compelled to inquire, if, perchance, the courts have the power, does it follow that the judges out of court possess it also? If so, whence does it flow? Not from the constitution, for that is silent on the subject — not from the treaty, for that is equally silent — not from any express statutory enactment, for the want of that has been, throughout the whole case, the great ground of complaint — and not from necessary implication from any power otherwise granted. It seems to me, then, that it can trace its origin to no other source than the necessity or the convenience of the case. When we are brought to this point, then the whole course of reasoning on which was founded my decision, that the police magistrate acted without authority, becomes equally applicable to the district judge. In the absence of any provision of the constitution, of the treaty or of the statute, conferring the power upon that officer, I am compelled, by the view which I then took of the case, and which was acquiesced in on all hands, to arrive at the same conclusion as to his power.

It is with unfeigned diffidence, and after long consideration, that I have imbibed a view of this case, so different from that entertained by the learned judge whose decision I am compelled, from my position, thus to review. His long experience, and the high respect which I entertain for his judicial character, might have inclined me to yield my own conviction to his, if his own opinion of the power of the United States courts had been clear and decided, or if he had at all considered the power of a judge out of court; a distinction, I repeat, which has been rendered important by the subsequent decision of the supreme court of the United States.

There is another view of the case which has had its weight with me, and that is the mode of reviewing the decision of one of the federal judiciary, which is thus brought about. Such review is not ordinarily through the state tribunals, yet I see no way in which it can be avoided in this case. I was bound by the law of the sovereignty, whose minister I am, under severe penalties to allow

the writ of *habeas corpus*. It was to the prisoner, under our laws, a writ of right. The United States supreme court having denied to him the privilege of carrying up the decision of the district judge directly for their review, he had a right to resort to the state tribunals as the conduit through which he can more indirectly pass to that ultimate tribunal, whose peculiar province it is, to pass upon all questions arising under treaties made by authority of the United States.

The writ being returned before me, it was my duty to inquire into the cause of his detention, and that, not merely as it appeared on the warrant by which he was held, but as it might appear from any fact alleged before me, to show that his imprisonment or detention was unlawful, or that he was entitled to his discharge. 2 Revised Stat. 569, § 50. I have, therefore, of necessity, gone behind the mandate of the president, and inquired into the legality of the foundation on which it rested. And finding it to be wanting in the legal aliment necessary to support it, I have no alternative but to declare that the prisoner cannot lawfully be held under it.

It will be observed that I have, in this opinion, omitted to discuss many of the points raised before me on the several arguments which have been had in the case. This omission has not arisen from any want, on my part, of attention to and careful consideration of them, but solely from the belief that their consideration was not necessary to the determination of the case, on which I was to render my judgment.

There is, however, one topic, on which I differ in opinion with the learned district judge, which strikes me with so much force that I cannot forbear dwelling a moment upon it.

The Spanish treaty, which has been already alluded to, contained a stipulation as to the ratification and confirmation of certain grants of land therein mentioned. The English side of the treaty contained in that regard, the words "shall be ratified and confirmed." The United States supreme court, in construing those words in *Foster* v. *Neilson*, (2 Peters, 253,) held that they imported a contract to be performed at some future time, and therefore, as has been already mentioned, required legislation before that part of the treaty could become a rule for the courts.

That treaty again came before the court in *United States* v. *Percheman*, (7 Peters, 87,) and there it was said that the treaty was drawn up in the Spanish as well as the English language. Both were originals, and were unquestionably intended by the parties to be identical. The Spanish had been translated, and they then understood that the article (of the treaty) as expressed in

that language was, that the grants "shall remain ratified and confirmed," &c. The court then holds, that if the English and Spanish parts can, without violence, be made to agree, that construction which establishes this conformity ought to prevail. No violence is done to the language of the treaty by a construction which confirms the English and Spanish to each other. Although the words "shall be ratified and confirmed," are properly words of contract, stipulating for some future legislative act, they are not necessarily so. They may import that they shall be ratified and confirmed by force of the instrument itself. When we observe that in the counterpart of the same treaty, executed at the same time by the same parties, they are used in this sense, we think the construction proper, if not unavoidable.

To apply that principle to the case in hand.

The convention with France, under consideration, is drawn up in the French as well as the English language. In the latter language, when the party to be surrendered is spoken of, he is twice spoken of as the person "charged," and twice as the person "accused." In the French counterpart, the expression is uniformly *accusé*: "*les individus accusés*," — "*les individus qui sont accusés*," — "*les individus qui seront accusés*," — "*l'individu ainsi accusé*."

It appears, from the opinion of the learned district judge, that it was claimed before him that this French phrase was equivalent to the term in our law *indicted*, or *arraigned*, and that it was proved before him, that such is the understanding of the term by the bar and courts in France; *inculpé* and *prévenue* designate persons against whom criminal charges or proceedings are instituted, up to the period when the charges are acted upon by the *chambre de conseil* and an accusation is decreed by it, and then, and not before, they became *accusées*. *Code d'Inst. Crim. Acts*, 127, 128, 241, 265.

The same question then arises here that arose under the Spanish treaty, which language is to prevail in the construction? If the English, then a party merely "charged" or "accused" before the committing magistrate, may be demanded. This prisoner is in that precise situation. He has been charged or accused before a magistrate authorized to arrest, and nothing more. But if the French phrase is to prevail, then the prisoner does not come within the treaty, because he has never been indicted or arraigned, never been *mis en accusation*.

There is a great difference in the French practice, as well as in ours, between a person merely charged with a crime, and one who has been indicted; between *inculpé* and *accusé*. There is much

more solemnity in the latter than in the former — more probability of guilt. A further progress toward conviction has been attained, and the questions, both as to the guilt of the prisoner and the nature of the offence no longer rest merely upon the untried and uninvestigated complaint of a party, but have been investigated by the proper tribunal, the grand jury, or the *chambre de conseil*, and probable cause for the accusation been duly found, and the nature of the offence charged duly defined.

This is an important consideration, for it is not every offence with which a person may be charged, for which he can be surrendered. It is only a few specified cases, and it often becomes an extremely difficult question for courts, even after the fact is established, to ascertain the nature of the offence growing out of it.

In this case, it is very difficult, if not quite impracticable, for an American lawyer to determine whether the act charged upon the prisoner was forgery under the French law. If the matter had passed through the *chambre de conseil*, and the prisoner had been *mis en accusation*, had become *accusé*, it would have been judicially determined that if the prisoner had done the acts imputed to him, it would constitute the crime of forgery; but now the complexion of the act, whether forgery or not, rests in a great measure, if not solely, on the charge of the complainant. So too under our law, it is often difficult to define the boundary between breach of trust and constructive larceny; between mere fraud and the felony of obtaining money under false pretences. And when we come to the exercise of so important a duty as the surrender of a native or naturalized citizen to the demand of a foreign nation, to be tried in a foreign judicatory, shall it depend on the complexion which the anger or malice of the complainant may give to the case, or shall it obtain its hue from the investigation which the grand jury or the *chamber de conseil* may subject it to?

These inquiries are too important to have escaped the attention of the contracting parties, and hence we find that a phrase, having a definite meaning in the French code, entirely inconsistent with the idea of allowing so important a consideration as extradition to rest upon the color which the complainant may give the matter, purposely, repeatedly and carefully used, in a manner, which under our law gives it controlling influence over both parts of the treaty, so that a person demanded of the French government by ours, would not be surrendered unless he had been indicted, or *mis en accusation*. At all events, the French government might

so act with great propriety, and point to the language it had carefully used in the convention as a perfect answer to the demand.

Entire reciprocity was evidently aimed at by both parties, and I cannot conceive a reason why the language of the supreme court in regard to the Spanish treaty, does not apply here with equal force; and why I am not bound to hold as the supreme court then held, that if the English and French parts can without violence be made to agree, that construction which establishes this conformity ought to prevail, and that no violence will be done to the language of the treaty by a construction which conforms the English and French to each other.

If this construction is to prevail, then it is inevitable that the prisoner is not within the treaty, and cannot be demanded by the French government, nor surrendered by the American, but is entitled to the protection of the laws of this state against the attempt to surrender him.

The conclusion, then, at which I have arrived, is, that the prisoner is not a party accused — *mis en accusation* — within the meaning of the treaty, and that the president cannot execute the power of extradition without both legislative and judicial sanction. And I acknowledge that the conclusion commends itself to my favor, because of the protection it is calculated to afford to personal liberty against executive authority.

The prisoner must therefore be discharged.

Supreme Court of Pennsylvania, Autumn Term, 1847, *at Pittsburg*.

PARKER *v.* COMMONWEALTH.

The exercise of legislative power by the people, in the several states, has been confined to the establishment of a constitution, the amendment of its defects, the correction of the abuses of government, and the choice of public servants. The necessary authority for making laws, being delegated to the agents of the people, must be exercised by them in the mode prescribed by the constitution.

The representative cannot transfer his duty, even to the people themselves, for they have forbidden it, by a solemn expression of their will, much less can they to a portion of the people, who cannot claim to be the exclusive recipients of that part of the sovereignty retained by the whole community.

Consequently, a law enacted by the legislature of Pennsylvania, authorizing the citizens of certain counties to decide by ballot whether intoxicating drinks shall be sold in said counties, is wholly void.

Notices of New Books

REPORTS OF CASES ARGUED AND DETERMINED IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE FIRST CIRCUIT. By CHARLES L. WOODBURY and GEORGE MINOT, Reporters of the Court. Volume I. Boston: Charles C. Little and James Brown. 1847.

THIS is the first volume of Decisions in the First Circuit, which has appeared under the charge of the present reporters. On first examining the work, we were very much struck with the variety of the cases, and the diversified labor, which has been required of the court. The present volume contains thirty-eight cases. Of these, nineteen are in equity, fifteen are at common law, one in admiralty, two in bankruptcy, and one comes up on a petition for naturalization. There are several intricate cases of equity and common law pleading, an unusual number of patent cases, and several cases under the old federal bankrupt law, and the insolvent law of this commonwealth. The other subjects which have been investigated, are the rights and duties of marshals, postmasters, military officers and seamen, the Ashburton treaty, the slave trade, mortgages, insurance, fraudulent conveyances, and the obstruction of navigable rivers and mill streams. It is very easy to detect, from the course of practice, the willingness of the citizens of Massachusetts to run away from their defective jurisdiction in equity, and the operation of their own insolvent law. In *Boody et al.* v. *United States*, (p. 151,) which was an action against the sureties of a deputy postmaster, the marginal note says that "a payment is to be applied to the oldest debt, if the debtor gives no directions." We do not see that such an abstract proposition is justified by the text, which leaves the whole question of the appropriation of payments as much in the dark as ever, and we doubt whether the court mean to be understood as laying down any general rule. The already well-known case of *Towne et al.* v. *Smith*, (p. 115,) involves the whole question of the jurisdiction of the federal courts in opposition to our insolvent law. It was reported in the last volume of the Law Reporter, p. 12, and we adhere to the opinion which was then expressed. (p. 46.) In the case of the *British Prisoners*, (p. 74,) our readers will recognize a different result from that which Judge Edmonds arrived at in *Metzger's Case*, as reported in our present number. In the case of *United States* v. *Ames*, (p. 76,) a principle is laid down, which we do not remember to have seen fully set forth elsewhere, viz.: that no officer of the United States can enter into a submission to arbitration on their behalf, unless the authority be given by a special act of congress, and the court refer to the Pea Patch Case, in Delaware Bay, where such serious inconvenience was experienced in procuring authority to refer the dispute. The case which takes up more room than any other, is the indictment of the New Bedford Bridge, (p. 401.) In this case, a successful motion was made by the defendants to quash the indictment because congress had not declared the act charged in the indictment to be an offence against the United States, and consequently, the court had no jurisdiction. The opinion of Judge Woodbury is very learned, upon the subjects of constitutional law and admiralty jurisdiction.

We have two criticisms to make upon

this volume. In the first place, the arguments of counsel are overlooked. We believe there is no account of what was said by counsel, except in the case of *United States* v. *Ames*. Our second criticism is perhaps over nice, but we cannot omit to say that the appearance of the work would be more *artistical* if the names of parties were given in full in every citation, as well as the name of the reporter and the number of the page. We have also thought that in several instances, the marginal notes are too full to amount to an abridgment of the case. But we do not wish to be hypercritical, and as we appreciate the value of this volume, we heartily wish it success.

A Treatise on the Law of Legacies. By the late R. S. Donnison Roper, Esq., Barrister at Law, of Gray's Inn, and by Henry Hopley White, Esq., Barrister at Law, of the Middle Temple. The Fourth Edition. In two volumes. London: William Benning & Co. Law Booksellers, 43 Fleet street. 1847.

We are glad to see a new edition of this valuable standard work on legacies. This is the fourth London edition, prepared by the editor of the third, Henry Hopley White, Esq., favorably known to the profession as the editor of Cruise's Digest, and of the eighth edition of Watkins on Conveyancing. The third London edition of Roper was printed in 1828, and reprinted in this country, at Philadelphia in 1829, the American edition being the first ever reprinted on this side of the Atlantic. The new edition has increased very considerably in size from the number and intricacy of the cases which have arisen and been adjudicated since 1828, as no less than *thirteen hundred* new cases are stated or referred to by Mr. White in his additions to the text and notes. The subject of devises and legacies is of great practical importance and interest to the profession, and since the publication of this work we are in possession of two elaborate and thorough treatises on perhaps the most complicated and difficult of all subjects which daily exercise the patience and learning of the bar. Mr. Jarman's Treatise on Wills (especially with Mr. Perkins's notes), and the carefully prepared volumes before us, leave little to be desired in the way of authorities and cases on the law of Wills. We are glad to learn that R. H. Small, a law publisher of Philadelphia, has this edition in press, and that it will soon appear with references of American cases. We commend this book, after an attentive perusal, with much satisfaction, to the consideration of the legal public.

A Treatise on the Law of Copyright in Books, Dramatic and Musical Compositions, Letters and other Manuscripts, Engravings and Sculpture, as enacted and administered in England and America; — with some Notices of the History of Literary Property. By George Ticknor Curtis, Counsellor at Law. Boston: Charles C. Little and James Brown. London: A. Maxwell & Son, 32, Bell Yard, Lincoln's Inn. 1847.

This work has been received, and carefully examined. It treats of a peculiar branch of the law, and is a work of literary as well as professional merit. The theory of literary property has latterly attracted increased attention, on account of the earnestness with which an international copyright law has been advocated. Unfortunately for the untutored public, it is a question which can never be fairly considered, as most of those who are competent to discuss it, are interested in favor of the extreme rights of authors. This work takes the most extreme ground which the present state of the law will warrant. But there is not room in the present number to discuss its details as fully as might be desired. A more elaborate and critical notice has been prepared, which will appear hereafter. The literary excellence of this publication is very great. The style is clear and manly, and the author has collected some curious and interesting facts in the history of literary property, which will well repay an attentive perusal.

The work is beautifully printed, and reflects great credit on the publishers. We heartily wish that it may have a general circulation, for it contains much interesting general information, besides its great professional utility.

Intelligence and Miscellany

THE METZGER CASE. We take great pleasure in publishing the elaborate opinion of Judge Edmonds in this case. Since it was in type, we have received a previous opinion of the same judge, discharging Metzger, when he was arrested on a warrant issued by one of the police magistrates. As this is essential to a full understanding of the second decision, it is here inserted in full. We regret that it was received too late for an insertion in the body of the work.

EDMONDS, J. It seems now to be well settled that it is not the law or the usage of nations to deliver up fugitives from justice, whatever may be the nature or atrocity of the crime, unless in pursuance of a treaty stipulation.

The opinions of early jurists were, however, different. Chancellor Kent, in conformity with their views, in *Washburn's Case*, (4 Johns. C. R. 108,) declared that it is the law and usage of nations to deliver up offenders charged with felony and other high crimes, and fleeing from the country in which the crime was committed, into a foreign and friendly jurisdiction. And the attorney-general of the United States in 1797 gave it as his opinion that it was the duty of the United States to deliver up on due demand heinous offenders, being fugitives from justice. (Opinions of Attorneys General, vol. i, 46.)

But at a later period different views have obtained. In 1821, the attorney-general of the United States declared that the modern usage and practice of nations had been contrary to the doctrines of the early jurists, and that it was not now the law and the usage of nations to deliver up fugitives from justice, unless in pursuance of a treaty stipulation. (Opinions, &c. 384, 392.) In *Holmes's Case*, reported in 14 Peters, the president refused to surrender the fugitives because there was no treaty between the United States and Great Britain providing for it. In that case the supreme court of Vermont afterwards in 12 Vermont Rep. 630, denied the right to surrender. Such also was the ruling of the supreme court of Pennsylvania in 1823, in *Commonwealth* v. *Deacon* (10 Serg. & Rawle, 135); of Judge Story in 1837, in *United States* v. *Davis* (2 Sumner's Rep. 486); and of Barbour J. in 1835, in the case of *Jose Ferreira des Santos*, (2 Brock. 515.) In the case of *Holmes and Jennison*, (14 Peters, 575,) although the judges were divided in opinion as to the right of a state to deliver up a fugitive where there was no treaty, yet they all agreed in denying the power to any single state in the Union, where an express treaty stipulation had been made on the subject between the United States and any foreign government. So that in a case like the present, where delivery of the fugitive is provided for by a treaty, it is well settled that the state has no right to interfere, and of course that the state authorities cannot exercise any power in the matter unless that power has been specially delegated by congress to those authorities to act for, and as the agents of the general government, or as part of the judicatory of the United States.

It has been questioned, by some of our soundest jurists, whether it is competent for congress to confer any of the judicial power of the United States upon state tribunals. In *The United States* v. *Lathrop*, (2 Johns. Rep. 4) our supreme court held that in no sense can the state courts become the inferior courts intended in the constitution, and they ask

where is the authority in the constitution to invest the state courts with jurisdiction of causes, which they did not enjoy concurrently before the adoption of the constitution. And in *Martin* v. *Hunter's Lessee*, (1 Wheat. 330,) the supreme court of the United States declare that congress cannot vest any portion of the judicial power of the United States, except in courts ordained and established by itself, and that no part of the criminal jurisdiction of the United States can, consistently with the constitution, be delegated to state tribunals. To the same effect is the decision of our supreme court in *United States* v. *Lathrop*, (17 Johns. Rep. 9,) that the jurisdiction of the state courts is excluded in cases of crimes and offences cognizable under the authority of the United States.

This power is not merely ministerial. It embraces something more than physically surrendering, for any one might seize and surrender who could lay hands on the fugitive. It comprehends the power of deciding the very delicate question whether the party demanded ought to be surrendered, and in determining the question, the claims of humanity, the principles of justice, the laws of nations, and the interests of the union at large, must all be taken into consideration and weighed when deliberating on the subject. *Case of Holmes, et al.* (14 Peters, 575.) Hence the power has been vested in the general government, and the utmost that the courts can do, is to arrest and detain until the general government determine the question of surrender. But these courts must be the courts of the United States alone, because they alone constitute parts of the general government, to which this power is committed, to the exclusion of all state authority.

It is not, however, necessary for me to predicate my decision upon the ground that congress cannot confer the authority upon state tribunals, though the decisions of our supreme court and that of the United States would seem to warrant that doctrine. It is controlling with me that I cannot find any delegation of the power to the state officers. There are cases where power exercised under the federal constitution has been conferred upon state tribunals, but so strict has been the doctrine as to the judicial officers of one government executing the criminal laws of another, that although the act of congress authorizes magistrates to arrest for crimes against the United States, yet the legality of their warrants has been sustained only upon the ground that it was competent to have authorized private persons to act, and that magistrates are designated as a class of persons by their name of office. *Case of Santos*, (2 Brock. 515.)

Since the power of seizing and surrendering fugitives is vested in the government of the United States, and where it has been exercised by making a treaty in regard thereto, it rests in that government to the exclusion of all state authority, and the state magistrate cannot exercise any part of the authority, unless specially delegated by the United States government to him, it becomes proper next to inquire whether there has been any such delegation of the power. The treaty with France does not in terms or by implication confer it.

The first article provides that on requisitions made by their diplomatic agents, the parties to the treaty will deliver up to justice persons who, being accused of the crimes enumerated, shall be found in the territories of the other, provided that this shall be done only when the fact of the commission of the crime shall be so established as the laws of the country in which the fugitive or the person so accused shall be found, would justify his or her apprehension and commitment for trial, if the crime had been there committed. And the third article declares that on the part of the government of the United States the surrender shall be made only by authority of the executive thereof.

We search in vain in the treaty for any authority to act at all in the matter of the arrest and surrender of a fugitive except in the executive of the United States.

We have many treaties with different nations providing for the surrender of deserting seamen, some of which specify the manner in which it should be done, viz , by application to any court, judge, or magistrate of the country where the deserter may be found So far as our country is concerned, this has been held to confer the power solely upon magistrates holding their appointments from the United States, and hence congress has passed laws extending the benefit of those treaties, and authorizing "any

court, judge, justice, or other magistrate having competent power to issue warrants," to cause the deserters to be arrested. See the act to provide for the apprehension and delivery of deserters from French ships in the ports of the United States, passed May 4, 1826. (3 Story's Laws of the United States, 2021.) And the act to provide for the apprehension and delivery of deserters from certain foreign vessels in the ports of the United States, passed 2d March, 1829, (4 Story's Laws of the United States, 2169.)

I have not been referred to any such act of congress in regard to fugitives from justice from foreign nations, nor have I in my own researches found any. The only statute I have been referred to as bearing on the subject is the 33d section of the judiciary act. That section enacts that for any crime or offence against the United States, the offender may by any magistrate of any of the United States where he may be found, be arrested and imprisoned or bailed for trial before such court of the United States as has cognizance of the offence.

This statute is, by its very language, confined to crimes against the United States, cognizable in the courts of the United States. The offence with which this prisoner is charged is not against the United States, but is against the laws of France. It is not cognizable in the courts of the United States, but only in the courts of the Freneh people, such is also the construction which the courts have put upon the statute; in the case of *Jose Ferreira des Santos*, (2 Brock. 514,) application was made to the United States circuit court in Virginia, for the detention of the prisoner until he could be demanded by the Portuguese government for the crime of murder committed by him in Portugal, and the court say, —As to criminal law, I believe it is settled everywhere, that one country will not execute the penal laws of another, not even its revenue laws. So far is this carried in this country, that the courts of one state will not execute the penal laws of a sister state, or of the federal government.

The crime charged against the prisoner is one against the laws of Portugal, not against the United States. Over the crime itself here, the judicial officers of the United States have no jurisdiction.

If they have no jurisdiction over the crime, whence can they derive the authority to arrest the party charged with that crime, and detain him with a view to a trial therefor in another and foreign jurisdiction?

Let us look for a moment at the legislation of congress upon the subject of arrest in criminal cases.

We are authorized to arrest for any crime or offence against the United States, for what purpose? The act of congress informs us that it is for trial before such court of the United States as by that act has cognizance of the offence.

Now the crime with which the prisoner is charged is not against the United States, and the arrest or detention is avowedly asked not for the purpose of a trial before any court of the United States. See also *United States* v. *Lathrop*, (17 J. R. 9.)

Two considerations were suggested to me on the argument which I briefly notice:

1. That the power of arresting and surrendering fugitives is executive, and not judicial in its character, and that the state magistrates act therefore not as part of the judiciary of the United States, but as agents of the president.

If this is a just view of the matter, then there is this insuperable difficulty, that there is no evidence that the executive has delegated its power or any portion of it to the police magistrate acting in this matter. There is no express delegation, and as has been already shown, none can be justly implied from the treaty, or the laws of the United States.

And in 10 Serg. & Rawle, 135, the supreme court of Pennsylvania express their doubts whether the president has a right to act until congress legislate, and declare that the opinion of the executive hitherto has been, that it has no power to act.

2. The other consideration is, that the state magistrates must have power in the premises, or the anomaly will be presented of a treaty which the government is bound to execute, but without any of the necessary means being provided for carrying it into effect. This would be a proper and doubtless a controlling argument to be addressed to congress, but can afford no reason for any interference of the state magistracy. Is it, or can it be our duty, as officers of the state government, to stretch our

powers for the purpose of enabling the general government to perform its duty, to enlarge our jurisdiction by implication, because the general government sees fit to neglect its duty. The power belongs to the general government alone, and upon that government alone rests at once the duty and the responsibility, and it is as well for us if the state authorities leave it there, lest the anomaly might be presented of a person arrested and detained by us, whom the federal authorities might refuse to surrender, or of a person whom they might desire to deliver up against our refusal to arrest or detain.

And the argument drawn from necessity of the case, if allowed free admission into the question of jurisdiction, may easily be converted into an instrument of usurpation, which might lead to great confusion, but would in the end be sure to terminate in swallowing up the state authorities in the grasping and more extended power of the general government. Power is ever stealing from the many to the few.

I was referred, on the argument, to a letter from the secretary of state, and opinion of the attorney-general of the United States, as showing that in their construction of the laws the state magistrates were possessed of the power which has been exercised in this case.

I do not so understand these documents. It is only "in regard to the degree of evidence which may be required to establish the fact of the commission of the crime," that reference is made to the "laws of the several states in which the fugitive may be arrested or found;" and it is expressly said, that the decision must be referred to the judgment of the United States officer, whose aid may be invoked in execution of the treaty.

Thus, as I understand this language negativing the idea that state authorities are to be invoked in execution of the treaty, and submitting the whole matter, when I think from principle and precedent it properly belongs to the authorities of the general government.

The prisoner must therefore be discharged from the warrant issued by Justice Drinker, but he is remanded to the custody of the sheriff on the *capias ad respondendum* issued in the civil suit.

Hotch Pot.

It seemeth that this word hotch-pot, is in English a pudding, for in this pudding is not commonly put one thing alone, but one thing with other things put together. — *Littleton*, § 267, 176 a.

Bank Liens upon Produce. The following case has been recently decided in Albany. *The Bank of Rochester* v. *Jones*.— This was an action of trover, brought to recover two hundred barrels of flour, under the following circumstances: One Foster, a dealer in flour in Rochester, purchased the flour in question and consigned it to the defendant, his factor or commission merchant in Albany, to be sold; and on the same day, drew a draft on the defendant for $950, a portion or the whole of the supposed value of the flour. Foster took the carrier's receipt by which he, the carrier, merely admitted the receipt of the flour, and agreed to convey it without delay to the defendant, and presented the draft and carrier's receipt at the plaintiff's bank, and obtained the money on the draft; Foster and the Cashier of the bank supposing and intending, in accordance with a usage of trade which had prevailed to some extent for about three years in Rochester, and was also proved to have prevailed in some other places, that the delivery of the carrier's receipt under these circumstances, would give the bank a lien on the flour as security for the acceptance of the draft at least, if not for its ultimate payment. The bank sent the draft and receipt, pinned together, to Albany for presentation, but the draft was protested for non-acceptance, and the defendant at first took off and retained the receipt, but on its afterwards being demanded by plaintiff's agent, delivered it to him. The defendant received the flour from the carrier, paid his charges upon it, and sold it. Afterwards the flour was demanded of the defendant on behalf of the bank, when the defendant claimed a right to the proceeds, towards his general balance, he owing at the time of this shipment in advance to Foster the consignor, for previous acceptances on account of flour, to more than the value of this consignment.

On a bill of exceptions, previously taken in this cause, the Supreme Court decided, that whatever Foster and the officers of the bank may have intended by this transaction, it did not amount to a sale, mortgage or pledge, of the flour, or any other lien known to the laws of this State, on which the factor receiving the flour with the usual bill of lading to sell, could be sued in trover for selling it. Under this decision, the Judge ordered the plaintiff to be nonsuited, to which an exception was taken, with the view of carrying the question to the Court of Appeals.

The London newspapers censure an indignation meeting, which has been recently holden in the metropolis, to review a recent decision.

The circumstances were briefly these:— Lord Bury, the plaintiff in the action, entered the shop of the defendant, Clark, in Jeremy street, and asked to see some pen-holders, exhibited in the window and ticketed 6d. each. Not liking the article on examination, he said to Mr. Clark — "these are of no

use — it is very well for you to puff off your trumpery articles." Whereupon Mr. Clark told the Lord he "was a trumpery fellow, and must leave the shop."

Lord Bury refusing to do so, a policeman was sent for, whereupon his Lordship departed — but afterwards returned, and thereupon was forcibly put out by Mr. Clark.

For this assault the action was instituted by Lord Bury before the County Court of Westminster, and judgment was obtained against Clark, for £20 damages.

A meeting of his brother shop-keepers, and of many others was holden at the Crown and Anchor, and the decision of the Judge was vehemently condemned as infringing the old English maxim that "every man's house is his castle."

One of the newspapers assails this meeting, and in reference to the maxim referred to says "non constat that because a man's house is his castle, his shop is also his castle, for a man's shop is a place into which he invites the public to buy, and hence the entry is no trespass in law."

Unless the principle set forth in the *Six Carpenters' Case*, 8 Coke, 290, is to be disregarded, the ruling of the court is clearly wrong. A tavern may not be the fittest place to review the proceedings of law courts — yet when a complaisant Judge bends law and common sense to the gratification of rank at the expense of the personal rights of a humbler citizen, it is not to be wondered at that a strong popular feeling should have been aroused.

The following points, among others, have been decided by the Supreme Court of Pennsylvania, at the Autumn Term, at Pittsburg.

In the Case of Duncan Campbell's Estate. Gibson, C. J. Directions given by one in contemplation of death, to an attendant, to destroy certain promissory notes, or give them to the drawer, in case he should die before seeing him, are but unexecuted intentions to give *in futuro*, and may be countermanded; and not being in the nature of a testamentary disposition, they become inoperative by death.

A discharge of a debt without consideration, or surrender of the security by writing, not under seal, is ineffectual. (This case contradicts *Wentz* v. *Dehaven*, 1 Serg. & Rawle, 317.)

Shaw v. *Galbraith et al.* Roger J. Deed which omits in the habendum the words "heirs" but contains a covenant of general warranty to grantee, against the grantor and his heirs, will operate to convey a fee simple, by way of estoppel.

Chambers v. *Lesley.* Coulter, J. A verdict in ejectment, wherein the tenant was the party on record, is admissible in evidence in a subsequent suit, wherein the landlord was the party, instead of such tenant.

One tenant in common may recover mesne profits from his co-tenant by whom he was ousted, and against whom he recovered in ejectment, unless an unreasonable delay occurred in taking possession.

Where there was a judgment against *one* in ejectment and in trespass, for mesne profits, declaration against *two* jointly, with general plea and verdict for plaintiff, the error will be cured by the several judgment plaintiff taking against the *one*, with *nol. pros.* against the other, thus incorrectly joined.

Dickey v. *Dickey.* Coulter, J. Where the parties had owned land, and its stock, utensils, &c. together, and divided the land by compromise, in this suit brought to test the ownership of the personalty, an article of agreement touching the ownership of the land was part of the *res gestæ*, and as such the court below should have received it in evidence.

Finn v. *Commonwealth.* Gibson, C. J. A judgment rendered on conviction of assault and battery on, and rescue of goods from a constable, was reversed — because the indictment showed that the execution had been issued more than twenty days at the time of the levy, and his authority therefore expired.

Knight v. *Abert.* Gibson, C. J. In Pennsylvania, and probably all the United States, the owner of cattle is not liable to an action of trespass for their browsing on his neighbor's wild land. But such owner of land is not liable to recompense the owner of the cattle the value of an ox, who was killed by falling into a pit dug in search for ore and left open. If a man will use his neighbor's lands as pasture fields, he must take them as he finds them, and bear the consequences of their condition.

Stevens v. *Wylie.* Coulter, J. Evidence of prior improvements, made sixty years since, now first adduced to supply negligence in not returning a survey, will not avail against a regular land office title of more than fifty years. (The doctrine of the S. C. 1 Binn. 458, approved.)

Frye v. *Shepler's heirs.* Coulter, J. The statute of frauds, &c., will avoid a parol contract for the sale of land, unless exclusive possession, by definite boundaries, be distinctly proved.

Brown's Heirs v. *Nickle.* Per Curiam: Parol proof of the understanding of the parties, that a conveyance was a conditional sale, not admissible. Such understanding must be gathered from the writing.

In the obituary notice of Chancellor Harper, in the last number, it is stated that he was appointed in 1825. He was in fact first appointed Chancellor in 1820, elected to the old Court of appeals in 1830, and when this court was abolished in 1836, he was again made Chancellor, and remained in office until his decease. But it matters little. Chancellor Harper's reputation rests on too firm a foundation to be injured by any error as to the duration of his official career.

Obituary Notices.

In Dallas County, Alabama, Feb. 15, Hon. Reuben Saffold, aged 58, formerly Chief Justice of the Supreme Court of that State. The deceased was born in Wilkes county, Georgia, Sept. 4, 1788, and studied law in Watkinsville, in that state, with the accomplished Paine. For a short time, he practised law in Georgia, and was eminently successful, but in 1813, he removed to Jackson, in Clark county, Alabama, — the State of Alabama then forming part of the Mississippi Territory. Shortly afterwards, he became actively engaged in the defence of the frontier against the Indians, and was chosen captain of a company of volunteers, which he raised, and was distinguished for his gallantry and indomitable courage.

About this time, he served for several sessions in the Territorial Legislature of Mississippi. After peace was restored in 1815, he continued the practice of his profession in Clark County, and in 1819, he was chosen to the convention, which framed the State constitution. In December of the same year, he removed to Dallas County, where he continued till the time of his decease, universally beloved and respected.

At the first session of the State Legislature in 1819, he was elected one of the Circuit Judges, thus becoming *ex officio* a member of the Supreme Court. In January, 1832, an act was passed to organize a separate Supreme Court, and Judge Saffold was elected one of the three Judges. Upon the resignation of Chief Justice Lipscomb, in 1835, he was chosen Chief Justice. This office he held until 1836, when he voluntarily resigned, after having held the important trust of Justice of the Supreme Court for 16 years. And such was the confidence reposed in him, that so late as the summer of 1843, upon the temporary retirement of the late Judge Goldthwaite, the vacant seat was tendered him by Gov. Fitzpatrick, but he felt it his duty, to decline.

The reports of the Supreme Court will constitute an enduring memorial of his learning, research and patient industry. Endowed by nature with sound judgment and an accurate and discriminating mind, he never feared that laborious attention which enabled him to master the subjects he was to decide. Indeed his powers of study were proverbial, and he never abandoned the most complicated subject without a thorough exposition. In his judicial capacity, he was firm and dignified, but not austere. The utmost order prevailed when he presided. Courteous, kind and respectful to the bar, he was admired by all who practised in his court. He was eminently the friend of the young lawyers, who were confident, that, before him, youth and mature age would be equally favored.

Chief Justice Saffold married the daughter of Col. Joseph Phillips, of Morgan County, Georgia, and has left a numerous family. To his children he was very devoted, and ever inculcated upon them the purest sentiments of morality.

Upon the announcement of the death of Chief Justice Saffold, meetings of the bar were holden at Haynesville and Cahawba, at which appropriate resolutions of sympathy and respect were adopted, and when the fact was communicated to the Court of Chancery sitting in Dallas County, it immediately adjourned.

At Norwich, Connecticut, Nov. 1, Hon. Jabez W. Huntington, aged 59, a Senator of the United States.

The deceased was born at Norwich, Nov. 8, 1788, and was educated at Yale College, where he graduated in 1806. He pursued his professional studies at the Law School in Litchfield, from Feb. 1808, until the latter part of March, 1810, at which time he was admitted to the bar in Litchfield county, and immediately afterwards entered upon the practice of the law at Litchfield.

The following abstract from the Norwich Courier will show how constantly he has been engaged in public service:

"He represented the town of Litchfield in the General Assembly of Connecticut in the session of 1828. In April, 1829, he was elected a Representative in Congress for the 21st Congress. In April, 1831, he was again elected for the 22d Congress; and in April, 1833, was elected for the third time, to a seat in the 23d Congress. Having received in May, 1834, the appointment of associate Judge of the Superior Court and of the Supreme Court of Errors, he resigned his seat in Congress at the close of the 1st session of the 23d Congress. In May, 1840, he was appointed a Senator in the Congress of the United States, for the unexpired term of six years from the 4th of March, 1839, to fill the vacancy occasioned by the death of the Hon. Thaddeus Betts. Accepting this appointment, he immediately resigned his judicial office; and in 1845 he was reelected to the United States Senate for another term which had not expired at the time of his decease."

It will thus be seen that he has spent almost the whole of the last twenty years in public life. A statesman of more unbending integrity or more unwavering fidelity to what he deemed the best and highest interests of the Union, never occupied a seat in the Senate of the United States; and the records of that body during the last eight years bear ample testimony, to the untiring industry, energy and distinguished ability with which he discharged the responsible duties assigned him by his native State.

Insolvents in Massachusetts.

Name of Insolvent.	Residence.	Occupation.	Commencement of Proceedings.	Name of Master or Judge.
Albee, Henry N.	Boston,	Trader,	Oct. 27,	Bradford Sumner.
Alexander, James,	Lynn,	Laborer,	" 5,	David Roberts.
Baker, Charles F.	Boston,	Merchant,	" 6,	Bradford Sumner.
Ball, James E.	Holden,	Butcher,	" 14,	Isaac Davis.
Beny, Morrill P.	Boston,	Provision Dealer,	" 6,	Willard Phillips.
Bodwell, Nathaniel,	Boston,	Shoe Manufacturer,	" 11,	Ellis Gray Loring.
Brigham, Samuel D.	Lancaster,	Butcher,	" 21,	Charles Mason.
Bryant, David,	Boston,	Architect,	" 15,	Bradford Sumner.
Cary, Augustus C.	Amesbury,	Machinist,	" 25,	Ebenezer Moseley.
Chapman, Samuel,	Beverly,	Clerk,	" 14,	John G. King.
Chase, Heman,	Harwich,	Mariner,	" 23,	Zenas Scudder.
Crowell, Ezra F.	New Bedford,	Housewright,	" 29,	Oliver Prescott.
Currier, Daniel, Jr.	Amherst,	Bricklayer,	Sept. 8,	Edward Dickinson,
Currier, James M.	Boston,	Carpenter,	Oct. 20,	Bradford Sumner.
Davis, Prentis,	Belchertown,	Carpenter,	" 29,	Mark Doolittle.
Eaton, John H.	Boston,	Housewright,	" 11,	Ellis Gray Loring.
Eddy, Christopher F.	Taunton,	Housewright,	" 4,	Horatio Pratt.
Ellis, Philo M.	Berlin,	Trader,	" 5,	Bradford Sumner.
Ellsworth, Jeremiah,	Boston,	Ship Carpenter,	" 11,	Bradford Sumner.
Farale, Hugh,	Boston,	Coach Maker,	" 2,	Bradford Sumner.
Field, Robert R.	Cambridge,	Carriage Maker,	" 12,	George W. Warren.
Fisher, Amos W.	Lynn,	Shoe Manufacturer,	" 2,	David Roberts.
Frothingham, W. L.	Boston,	Clerk,	" 29,	Ellis Gray Loring.
Fuller, Leprelet,	Taunton,	Housewright,	" 18,	Horatio Pratt.
Gerrish, Samuel J.	Boston,	Brass Founder,	" 8,	Bradford Sumner.
Gardner, Peleg,	Pawtuckett,	Stable Keeper,	" 22,	Horatio Pratt.
Harris, John L. et al.	Boston,	Provision Dealer,	" 22,	Bradford Sumner.
Harrison, Lemuel	Fall River,	Stone Cutter,	" 7,	C. J. Holmes.
Haskell, George S.	Roxtury,	Merchant,	" 16,	Ellis Gray Loring.
Hayward, Lyman F.	Methuen,	Carpenter,	" 11,	James H. Duncan.
Hitchcock, C. M.	Northampton,	Joiner,	" 4,	C. P. Huntington.
Holt, Dean,	Andover,	Hu bandman,	" 15,	James H. Duncan.
Howard, Francis,	New Bedford,	Board'g House Keep-	" 26,	Oliver Prescott.
Howe, Charles,	Boston,	Clerk, [er,	" 18,	William Minot.
Huston, Hiram,	Boston,	Merchant,	" 16,	Ellis Gray Loring.
Ingalls, Charles N.	Andover,	Housewright,	" 26,	John G. King.
Jones, Calvin G.	Boston,	Provision Dealer,	" 5,	Bradford Sumner.
Jones, Samuel,	Northampton,	Tanner,	" 8,	C. P. Huntington.
Kelley, Benjamin,	Bradford,	Trader,	" 14,	Ebenezer Moseley.
Kimball, William H.	Lowell,	Trader,	" 15,	Bradford Russell.
Lampe, Charles A. et al.	Boston,	Stair Builders,	" 16,	Bradford Sumner.
Learned, Gearfield,	Boston,	Printer,	" 14,	Ellis Gray Loring.
Lucas, Edmund G.	Cambridge,	Trader,	" 15,	Bradford Sumner.
Lyons, John,	Roxbury,	Broker,	" 5,	Sherman Leland.
Mansfield, W. C.	Boston,	Innkeeper,	" 11,	Bradford Sumner.
Masof, John,	Charlestown,	Trader,	" 1,	George W. Warren.
McCorrison, James,	Lowell,	Carpenter,	" 30,	Bradford Russell.
McElroy, Charles,	Boston,	Merchant Tailor,	" 1,	Bradford Sumner
M'Ginnis, Charles,	Boston,	Iron Worker,	" 30,	Ellis Gray Loring.
Newell, Marshall,	Needham,	Trader,	" 1,	Sherman Leland.
Newton, Jonas P.	Lawrence,	Teamster,	" 11,	James H. Duncan.
Newton, Martin,	Fitchburg,	Manufacturer,	" 26,	Henry Chapin.
Nichols, F. P.	Belchertown,	Laborer,	" 6,	Mark Doolittle.
Palmer, Stephen,	Lynn,	Housewright,	" 21,	David Roberts.
Perry, Adams,	Uxbridge,	Physician,	" 8,	Henry Chapin.
Pratt, John W.	Randolph,	Cordwainer,	" 9,	Aaron Prescott.
Purinton, Frederick H.	Worcester,	Machinist,	" 27,	Henry Chapin.
Putnam, Ephraim et al.	Boston,	Stair Builders,	" 16,	Bradford Sumner.
Reed, Joseph W.	Topsfield,	Yeoman,	" 18,	David Roberts.
Robbins, Louis S.	Roxbury,	Merchant,	" 16,	Ellis Gray Loring.
Rhodes, Joel,	Pelham,	Carpenter,	" 2,	Mark Doolittle.
Rodgers, Isaac,	Dartmouth,	Laborer,	" 30,	Oliver Prescott.
Romedy, Alvan,	Boston,	Truckman,	" 21,	Ellis Gray Loring.
Russell, W. H.	Cambridge,	Trader,	" 29,	George W. Warren.
Sampson, Isaac,	Lawrence,	Carpenter,	" 27,	James H. Duncan.
Salisbury, W. S.	Chelsea,	Clerk,	" 21,	Bradford Sumner.
Tanck, John H. C.	Roxbury,	Cabinet Maker,	" 23,	Bradford Sumner.
Thompson, Elijah,	Boston,	Truckman,	" 9,	Bradford Sumner.
Waters, Charles J. B.	Scituate,	Wheelwright,	" 14,	Ebenezer F. Fogg.
Watts, Lawrence B.	Charlestown,	Rule Maker,	" 5,	George W. Warren.
Whitney, Abraham et al.	Boston,	Provision Dealer,	" 11,	Bradford Sumner.